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THE
AMERICAN LAW REGISTER
AND
REVIEW.

JANUARY, 1894.

THE NATURAL USE OF LAND.

BY JOHN MARSHALL GIFT.

PART I.

OVER seven years have passed since the Supreme Court, in *Sanderson v. The Pennsylvania Coal Company*,¹ reversed their previous decisions in the same case.² The final judgment of the court has been considered in several more recent cases and at this lapse of time the principles of the decision may be impartially and critically considered.

The facts are well known. To rehearse them briefly we find that the plaintiff, Sanderson, purchased in 1866 a tract of land within the limits of the city of Scranton through which flowed "Meadow Brook," a seven-foot wide stream of excellent water. The plaintiff was in part induced to purchase his land on account of this stream, the condition of which he investigated with some care. He built a handsome residence near by; dammed the stream to make ponds for ice and fish, and used the water in his

¹ 117 Pa. St., 126 (1886).

² 86 Pa. St., 402; 94 Pa. St., 302; 100 Pa. St., 370.

home for domestic and culinary purposes. A few years thereafter the defendant corporation sunk their shaft and drove several tunnels in their land which comprised some 1600 acres, situated on the same stream about three miles above the plaintiff's residence. Water, contaminated and polluted by the coal and minerals, not only flowed from the drifts, but also collected in this shaft from which it was pumped to the surface and conveyed by a ditch or conduit to the Gypsy Grove swamp on the defendant's land, through which the Meadow Brook flowed. As a consequence the water of this stream became acid and unfit for use; the fish in the stream were killed; the trees along its bank died; the water-pipes were corroded; and, finally, in 1875, the plaintiff abandoned the use of the water and used instead the water supplied by public water-works. The plaintiff thereupon brought an action of trespass on the case to recover damages.

Upon the first trial the court entered a non-suit, on the ground that the discharge of the mine water was necessary and was conducted without negligence or malice, and that the plaintiff's damage was *damnum absque injuria*. The Supreme Court was, in 1878, composed of AGNEW, C. J., and SHARSWOOD, MERCUR, GORDON, PAXSON, TRUNKEY and WOODWARD, JJ. Before these judges it was forcibly argued in behalf of the plaintiff in error, that the mining of anthracite coal could not be carried on in any other way. That the coal lies at great depth beneath the surface and cannot be mined without driving tunnels or shafts into the ground; that the collection of acidulated mine water was inevitable; that the mines are, and necessarily must be, freed from this water by pumping them out; that the water so removed must find its way to the surface streams; that the ordinary rules which prohibit the fouling of streams by a riparian owner could not be applied in such a case without destroying one of the greatest industries of the State and prohibiting the owners of mines from the ordinary development of their property.

Justice WOODWARD delivered the opinion of the

majority of the court (Justice PAXSON dissenting). It was held with great reason that the magnitude of the interests involved should not lead to the "relaxation of legal liabilities and the remission of legal duties," although "the proprietors of large and useful interests should not be hampered or hindered for frivolous or trifling causes." But the case was considered to fall within the general rule that a riparian owner had no right to injure the quality of the water to the detriment of others, and stress was laid upon the defendant's use of "an artificial water-course from the mines to Meadow Brook."

Upon this latter point the writer will observe although the water-course, or conduit, in question appears to have been laid from the shaft to the swamp in which Meadow Brook took its rise that the water would, in all probability and almost certainly, have flowed there anyway. One of the plaintiff's witnesses, an engineer, testified on the second trial¹ that it might have been thrown into Little Roaring Brook, but would not have flowed there naturally, if emptied on the ground at the head of the shaft. Indeed, Sanderson himself, a civil engineer by profession, testified on cross-examination in the second trial:² "Q. Where could The Pennsylvania Coal Company have taken the water to if they hadn't let it run into Meadow Brook? A. They could very easy take it across to the water shed, northeast of Meadow Brook, going down toward Olyphant."

Of course, such a proceeding would only result in a change of plaintiffs to a riparian owner on the other stream who could complain with justice that an artificial water-course was used to pollute his stream. Indeed, to throw the water "toward Olyphant" would require it to be *pipéd* across Meadow Brook, its natural drain.

"Q. How far would they have been obliged to have dug a ditch to carry the water into Eddy Brook? A. I wouldn't say to the brook. I only have reference to the other side of the hill.

¹ Record, p. 70.

² Record, pp. 139-140.

"Q. The other side of the hill then—the divide? A. Well I should think 1500 feet would carry it; it might be 2000. 1500 to 2000 feet, I should think, would carry it.

"Q. Wouldn't a ditch dug from the shaft toward the divide cross the Meadow Brook? A. Yes, sir; if dug direct.

"Q. Then they would have been obliged to put an aqueduct, or something, in to get water across Meadow Brook? A. A flume would have carried it across; pipes would have carried it over.

"Q. Water cast on the ground at the point where it is discharged from Gipsy Grove Breaker would run into Meadow Brook without any ditch, wouldn't it? A. Yes, sir; if it didn't waste away in the ground.

"Q. This Gipsy Grove Breaker is located on the edge of the swamp; isn't it? A. Yes, sir.

"Q. So any water put into the swamp would naturally go into Meadow Brook? A. Yes, sir.

"Q. So that the digging of this ditch 1000 feet long is of no consequence as to getting the water into Meadow Brook? A. It is more direct; it gets in quicker and gives it no chance to waste."

As the report of the case does not clearly give the facts in relation to the "water-course" the writer feels that no apology is due for the above extract from the plaintiff's testimony.

While the opinion of Justice WOODWARD would give the reader the impression that the injury complained of would not have occurred save for the "artificial water-course from the mines to Meadow Brook,"¹ it clearly appears that no substantial difference was thereby occasioned in the result.

Justice WOODWARD, however, appears to have considered the case in this respect analogous, *e. g.*, to *Wood v. Sutcliffe*,² where the waste water of a dye-works was pumped into a stream which it befouled; and to *Barclay v. Com-*

¹ 86 Pa. St., 406.

² 16 Jurist, 75.

monwealth,¹ where the wash from a barn-yard was permitted to escape into a spring dedicated by the Penns to the use of the town of Bedford. His opinion, however, was carelessly written and was afterward severely criticised in argument: Thus, *Smith v. Kenrick*,² stated to be of doubtful value was, on the contrary, applied by AGNEW, J., in *Locust Mountain Co. v. Gorrell*.³ *Fletcher v. Rylands*,⁴ is quoted as containing references not contained in it. DENMAN, C. J., is quoted as having held in *Mason v. Hill*,⁵ what he expressly says was merely the plaintiff's contention in the case; and the injunction in *Wood v. Sutcliffe*,⁶ was said to have been granted when, in fact, it had been refused.

The judgment of the court below was reversed and a new trial awarded. All the justices concurred, save Justice PAXSON, who delivered a dissenting opinion⁷ remarkable for its vigor and breadth. Said he: "The population, wealth and improvements (of the mining region) are the result of mining, and of that alone. The plaintiffs knew when they purchased their property that they were in a mining region; they were in a city born of mining operations, and which had become rich and populous as the result thereof. They knew that all the mountain streams in that section were affected by mine water or were liable to be. Having enjoyed the advantages which coal mining confers, I see no great hardship nor any violence to equity in their also accepting the inconvenience necessarily resulting from the business." Continuing, the learned Justice argued that the defendant had a right to mine its coal and that it had a right to free its mine of water by pumping if necessary, for otherwise no mine can be operated. This right is "a right of property which, when duly exercised,

¹ 25 Pa. St., 303.

² 7 C. R., 515.

³ 9 Phila., 247.

⁴ L. R., 1 Ex., 280.

⁵ 5 R. & A., 1.

⁶ 16 Jur., 73.

⁷ 6 W. R. C., 202; 113 Pa. St., 196.

begets no responsibility." Mining operations may destroy the springs upon a neighbor's land by interfering with the natural subterranean flow, and sinking one well may drain another. Agricultural and mining operations may increase the volume of water without occasioning an actionable injury, and the impurity necessarily occasioned by such operation should give no right of action. If this were not so, mines could not be operated except by consent of the riparian owners. In other words, "the trifling inconvenience to particular persons must sometimes give way to the necessities of a great community. Especially is this true where the leading industrial interest of the State is involved, the prosperity of which affects every household in the Commonwealth."

The second trial resulted in a verdict for the plaintiff for \$250. Plaintiff and defendant each took a writ of error. The defendant's writ was first heard.¹ AGNEW, C. J., had retired from the bench, and WOODWARD, J., had died. The case was argued before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKY and STERRETT, JJ. It was urged in behalf of the coal company that their disposition of the mine water had been according to universal custom and common consent ever since coal mining was begun; but the Supreme Court held that such a custom would be unreasonable and unlawful, and affirmed the judgment in an opinion by GORDON, J., which, it may be said, added nothing to the previous decision. Justice PAXSON again dissented, and with him agreed Justice STERRETT, who had taken his seat on the bench since the first decision had been rendered.

Had the plaintiff, Sanderson, been satisfied with the amount of the verdict, this second decision would have been final. But the lower court upon the trial of the case had permitted the defendant to show "in mitigation of damages" that the mining of coal was below water level; that water was necessarily encountered, and that the defendant worked its mine in the ordinary, reasonable and

¹ 94 Pa. St., 302 (1880).

proper method. This admission of testimony and certain instructions on the question of damages were assigned for error and held erroneous by the Supreme Court, Justice TRUNKY delivering the opinion, in which he spoke approvingly of the former rulings of the court upon the main question.

The Supreme Court had thus in three opinions held that the plaintiff, Sanderson, was entitled to recover damages for the pollution of the stream through the mining operations of the coal company, and the case was tried for a third time before a jury. The defendant asked the Court to charge that: "If the jury believe from the evidence that it was impossible for the defendant to mine its coal on its lands along this stream without discharging the mine-water from its mines, and that the mining was done without malice or negligence, and that no foreign substance was introduced into the mine-water by the defendant, and that when the mine-water was so discharged it followed the law of gravity as directed by the natural conformation of the land, and flowed by a natural flow into this stream and thence through the plaintiff's property, then, even if thereby the plaintiffs were damaged, it is a *damnum absque injuria*, and plaintiffs cannot recover."

The Court, in very proper conformity with the decisions of the Supreme Court, refused so to charge the jury, and a verdict was rendered in favor of the plaintiff for \$2872.74.

The situation was extremely serious for the coal company. The verdict was a large one in itself, and every riparian owner had an equal right with Sanderson to bring an action.

Sanderson, himself, might bring other actions to recover subsequently accruing damages, and it needed no prophet to predict the time when, in Justice PAXSON's phrase, "the subsequent verdicts would be such as to empty the cash-box of any coal company and make mining practically impossible." Indeed, it is more than likely, as CLARK, J., observed,¹ that the plaintiff, having thus estab-

¹ 113 Pa. St., 144.

lished his right at law, could ask a Court of Equity to enjoin its continued violation.

It was, therefore, determined to make a last endeavor to induce the Supreme Court to reconsider their decision and to establish a rule more favorable to the coal mining industry so closely connected with the prosperity of the Commonwealth.

The Court was now composed of MERCUR, C. J., GORDON, PAXSON, TRUNKY, STERRETT, GREEN and CLARK, JJ. Of these, GORDON and TRUNKY, JJ., had already delivered opinions favorable to the plaintiff. PAXSON and STERRETT, JJ., had dissented in favor of the defendant. MERCUR, C. J., had agreed with the majority of the Court, but GREEN, J., was not on the bench when the case was first argued, and was absent when the second and third arguments took place. CLARK, J., was a member of the Court when the question of the measure of the damages was argued, but was absent, so that Justices GREEN and CLARK had had no occasion to express their opinion upon the case.

The argument made in behalf of the coal company was successful. A bare majority of the Court reversed the judgment of the Court below, MERCUR, C. J., GORDON and TRUNKY, JJ., adhering to their original opinions.

On the one hand, the Court was met by the well-known rule repeatedly applied in Pennsylvania that a riparian owner cannot pollute or contaminate a stream of water flowing through his land; on the other hand, they were confronted with the disastrous consequences which would follow the application of the rule to the case at bar. It is perhaps not too much to say that no case ever arose in Pennsylvania of equal, certainly none of greater, importance to the industrial and material prosperity of the State.

It may be well at this point to refer to some of the prior decisions in this State.

In *Howell v. McCoy*,¹ a tanner was entitled by contract

¹ 3 Rawle, 236 (1832).

with the riparian owners to the use of so much of the water of the stream as should be necessary for the supply of his tan-yard, and covenanted to return to the stream all water which should thus be conducted to his yard over and above the quantity which should be necessarily used in his business. The tanner claimed under this lease the right to return the water to the stream mixed with the greasy and poisonous matter it acquired in the process of manufacture. But the well-established principle was followed that the corruption of a stream of water is actionable—a principle as old as the common law. The facts of this case are only alluded to in order to call attention to the argument made for the defendant, that it was a practical necessity for him thus to dispose of the waste from his business, and that the strict enforcement of the rule would prove injurious to "the manufacturing establishments which are arising so rapidly in this country."

The answer of the Court was "that is no reason why private rights should be injured."

In *Commonwealth v. Lyons*¹ the defendants were the owners of land over which ran a creek on which they had erected an iron furnace, forge and mills. They washed their ore with the water and thus corrupted it to the damage of the inhabitants on the creek below them. They were indicted (apparently for a nuisance) and convicted; the only question raised was whether the indictment was brought in the proper county.

Wheatley v. Chrisman,² came very close in its facts to the *Sanderson* case. There the upper riparian owner had a lead mine on his land and pumped the impure water from the mine into the channel of the stream, so that the same was rendered unfit for watering cattle and for the domestic purposes of the plaintiff. The quantity of water was also diminished. The disputed questions of fact were determined by a jury in favor of the plaintiff, who obtained the verdict. The defendant claimed in error that he had

¹ 1 Clark, 497 (1843).

² 24 Pa. St., 298 (1855).

a right to use a reasonable quantity of the water for the purposes of his business, but Judge BLACK, in his most trenchant manner, said there was no difficulty in the case. Said he: "The necessities of one man's business cannot be the standard of another's right in a thing which belongs to both. The true rule was given to the jury. The defendant had a right to such use as he could make of the water without materially diminishing it in quantity *or corrupting it in quality*. If he needed more, he was bound to buy it. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor. One who desires to work a lead mine may require land and money as well as water, but he cannot have either unless he first makes it his own."

Justice PAXSON, in his dissenting opinion in the Sanderson case,¹ refers to this case in connection with Howell v. McCoy,² and McCallum v. Water Works,³ as having no application, because in each of them "the water had been fouled by the admixture of dyestuffs or some other injurious substance." This criticism applies to Howell v. McCoy and McCallum v. Germantown Water Works; but it is impossible to see any difference between pumping water out of a lead mine into a stream and pumping water out of a coal mine, as in either case the water in the stream is rendered unfit for use.

For all that appears it was just as necessary to pump the water out of the lead mine in order to work it properly as to free the coal mine of water. The lead water had to go somewhere and the mining company had apparently the same right to rid themselves of it by means of the natural water course by which their works were placed as the Pennsylvania Coal Company had to use Meadow Brook for the same purpose.

From the standpoint of this case the plea of necessity is brushed aside much as the starving man's excuse is not

¹ 113 Pa. St., 157.

² 3 Rawle, 256.

³ 54 Pa. St., 40.

regarded as a defence in a prosecution for the theft of food, although his necessity may appeal to our sympathy. It is hard to understand why Justice WOODWARD did not cite this case, especially as it seems to have been referred to in argument.¹

Wheatley v. Baugh,² was decided in the same year as *Wheatley v. Chrisman*. The same defendant appeared in the case, but this time his alleged tort arose from the working of a copper mine. Chrisman sunk a shaft on his ground and so drained a spring on the plaintiff's premises. The Supreme Court held that the plaintiff had no cause of action in the absence of any malice or negligence in the conduct of the mining operations. It appeared that the spring depended for its supply upon percolations alone, and that no distinct water course had been cut off or diverted. "In conducting extensive mining operations," said the Court, "it is in general impossible to preserve the flow of the subterranean waters through the interstices in which they have usually passed, and many springs must be necessarily destroyed in order that the proprietors of valuable minerals may enjoy their own. The public interest is greatly promoted by protecting this right, and it is just that the imperfect rights and lesser advantage should give place to that which is perfect and infinitely the most beneficial to individuals and the community at large." And, in another place: "The law has never gone so far as to recognize in one man the right to convert another's farm to his own use for the purposes of a filter." This case was followed in *Haldeman v. Bruckhart*.³

Justice PAXSON cited *Wheatley v. Baugh* in his dissent in the *Sanderson* case; but the distinction seems to be that in *Wheatley v. Baugh* "it was impossible for him (Wheatley) to know from whence the supply of water came. He had no knowledge that it was derived from percolations through his own land. In this respect there is a material

¹ 86 Pa. St., 402.

² 25 Pa. St., 528 (1855).

³ 45 Pa. St., 514 (1863).

difference between hidden veins of water under the ground and water courses flowing on the surface." And again, the opinion in *Wheatley v. Baugh* admitted that "a subterranean stream which supplies a spring with water cannot be diverted by the proprietor above for the mere purpose of appropriating the water for his own use."

In *The New Boston Coal and Mining Company v. Pottsville Water Company*,¹ the Court refused to issue an injunction against a coal company which drained its mine into a creek, but the decision went on other grounds and the Court expressed no opinion on the merits.

Kauffman v. Griesemer,² and *Martin v. Riddle*,³ recognize the principle that the volume of water in a stream may be increased by the superior riparian owner in the improvement of his land. But an act of the legislature was considered necessary to enable the owner of swampy ground to extend his drain over the land of others "in order to effect the agricultural improvement and development of his land" and this was not permitted without compensation to the person injured.⁴

¹ 54 Pa. St., 164.

² 26 Pa. St., 407 (1856).

³ 26 P. St., 415 (1848).

⁴ The Act of Assembly reads as follows: "When the owner or owners of wet or spouty land, in this commonwealth, shall desire to improve the same for agricultural purposes, by surface or under drains, or both, and when, from any cause, it becomes necessary to extend said drains upon or over the land of other owners, in order to render them effectual, the person or persons so desiring to drain, may present a petition to the court of quarter sessions of the county wherein such land may be, setting forth the situation thereof, and the necessity for an extension of the proposed drain or drains upon or over the land of such other owners, specifying the probable extent thereof, and thereupon the said court shall appoint three judicious persons to view the proposed drain or drains; and said viewers shall view the same, and if they, or a majority of them, shall agree that there is occasion for such extension of such drain or drains, in order to effect the agricultural improvement and development of said land, they, or a majority of them, shall proceed to lay out the same, having respect to the shortest distance and the best ground for the location thereof, and in such manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners, and make report to the next term of said court of their

This "drainage act" was subsequently extended to several counties so as "to authorize the drainage and ventilating of coal and other mines, or banks, stone quarries, etc., in over or under the lands of other owners by drains, shafts, drifts or otherwise," and the anthracite coal mine act of June 30, 1885, P. L., 218, Art. IV, the bituminous coal mine acts of March 3, 1870, P. L., 3, § 4, June 30, 1885, P. L., 205, § 7, and May 15, 1893, P. L., 52, Art. IV, provide that a mine owner may make openings or outlets under, through or upon adjoining lands to meet the requirements of the statutes in regard to the ingress and egress of the employes, and the drainage and ventilation of the mine. The last-named act provides also for "a right of way not exceeding fifteen feet in width from any such opening to any public road to enable persons to gain entrance to the mine through such opening or to provide therefrom upon the surface a water-course of suitable dimensions to a natural water stream to enable the operator to discharge the water from said mine." While damages are to be assessed and paid for such right of way the act is silent upon the question of the pollution of streams, settled by Sanderson's case. The third section of the same article (IX) of this act deserves attention, which provides that where water has been allowed to accumulate in dangerous quantities and "can be tapped and set free and flow by its own gravity to any point of drainage" it shall be lawful with the approval of the inspector of the district to remove the danger by driving a drift across property lines if needful; and it is declared to be unlawful for any person to obstruct the flow of water from said mine or any part of its passage to the point of drainage.

proceedings; and said viewers, or a majority of them, shall assess the damages on behalf of the person entitled thereto, if any, in their opinion, will ensue from such extension, and report the same, together with a plot or draft of the drain or drains by them laid out, specifying also whether the same shall be surface or under-drains." Act of April 4, 1863, P. L., 593. It may be that this act is unconstitutional. See *Rutherford's Case*, 75 Pa. St., 82, on the similar Act of May 9, 1871, P. L., 263.

¹ *E. g.*, Act February 18, 1870, P. L., 197; March 10, 1871, P. L., 358; May 19, 1871, P. L., 987; March 9, 1872, P. L., 303.

No damages are directed to be assessed by this section.

Let us turn now to the English cases upon the subject decided prior to Sanderson's case.

*Hodgkinson v. Ennor*¹ was decided by COCKBURN, C. J., BLACKBURN and MELLOR, JJ. The plaintiff was a paper manufacturer on the banks of a stream which had its source in a cavern at the foot of a hill. The owner of the land on the summit of the hill, and, therefore, above the cavern, erected certain works for the manufacture of lead which he obtained from his land. The water, fouled in the process of manufacture, passed from the pits in which it was used through drains into what were known as "swallets"—i. e., fissures or rents immemorially existing in the limestone rock of which the hill was composed. Through these fissures the water found its way into the cavern, and so polluted the stream to the detriment of the plaintiff, who was held entitled to judgment. Indeed, the Court did not hesitate to compare the case to *Tenant v. Goldwin*² (an action for damages caused by the non-repair of a privy well), and to quote the remark there made, "he whose dirt it is must keep it that it may not trespass." In *Hodgkinson v. Ennor* it appears singularly enough that the lead existed in the defendant's land in the shape of minute particles and bits of ore which had "before the time of living memory" been brought there from distant parts to be smelted—the soil practically representing the *debris* of an ancient manufactory. So that it might be queried whether the lead was "naturally" in the soil and its mining a natural use in the phraseology adopted in Sanderson's case.

Bainbridge on Mines says of this case, *Hodgkinson v. Ennor*, in the third edition of the work, page 88: "If this judgment be correct and be strictly applied, it would follow that a mine owner in the proper exercise of his right might, in some cases, withdraw the whole of the water arising

¹ 4 Best & Smith, 229 (1863).

² 1 Salk., 360.

from springs, but that he could not disturb it by pollution." But this passage seems to be omitted in the fourth edition.¹

In *Magor v. Chadwick*² the suit was by a brewer against a miner for fouling the stream the water of which was used in the brewery. It appeared that the stream had its source in an abandoned level made for the purpose of mining at some remote period. The water issuing therefrom was pure and passed by a distinct water-course over the plaintiff's land, and the plaintiff had had continued and uninterrupted enjoyment of the water in its pure state for thirty-six years. The defendant reopened the ancient mine and the water was drained therefrom into the old level and souled the water of the stream. The trial judge left the question to the jury whether the evidence proved the existence of an alleged custom in Cornwall authorizing a mine owner to resume such use of an "adit" or level after an abandonment of twenty years, and ruled that in the absence of such custom a riparian owner using the artificial stream for twenty years acquired the same right as in a natural stream. A rule for a new trial was discharged, *DENMAN*, C. J., delivering the opinion of the court.

In *Pennington v. Brinsop Hall Coal Co.*,³ the plaintiff had for upward of forty years used the water of a brook to supply their engines and for general use in their mill. They claimed a right as riparian owners and also by prescription so to use the water. The defendants were the owners of a colliery adjoining the brook about two and a half miles above the plaintiff's mill, and they habitually pumped the water from the mine into the brook. This water contained sulphuric acid and other impurities which corroded and destroyed the plaintiff's boilers and machinery, causing considerable damage. The claim made by defendants as riparian owners and as entitled by prescription to enjoy the water of the stream in its natural purity was not denied by the defendants, who alleged that as matter of fact the

¹ See p. 233.

² 11 A. & E., 371.

³ L. R., 5, Ch. Div., 769; S. C., 37, L. T. N. S., 149.

injury was not caused by their operations but by other causes, and further that at most damages should be awarded but not an injunction, the effect of which would be to close their colliery. The report states that the defendants claimed a right to continue to pump the mine-water into the brook, and that even if their mines were closed in obedience to an injunction, the water would ultimately find its way by natural channels into the brook and pollute it as much as ever. They further alleged that the colliery employed 500 men, who would be thrown out of work if the colliery were closed, and that the entire capital stock of the coal company, amounting to £190,000, would be lost, whereas the damage to the plaintiff's boilers did not amount to £100 a year. The court awarded an injunction.

While this case was relied upon by Justice WOODWARD in the first opinion rendered in *Sanderson v. The Coal Company*, it was strongly urged in 113 Pa. St. that, as the plaintiff's prescriptive rights were admitted, and the question debated was whether an injunction or damages should be awarded, the case decided nothing on the question raised in *Sanderson's* case, and was not authority. This view was adopted by the Supreme Court, Justice CLARK holding that the right of a riparian owner was neither discussed nor decided. Careful consideration of this case and the other English authorities constrains the writer, contrary to his first impression, to believe that this case did not discuss or decide the question merely for the reason that the question was not considered doubtful.¹

¹ (The Rivers Pollution Prevention Act of 39 and 40 Vict., C. 75. § 5; 1876) provided in reference to mining pollutions that every person who causes to flow into a stream any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine *other than water in the same condition as that in which it has been drained or raised from such mine* shall be deemed to have committed an offence against said act, unless in the case of poisonous, noxious or polluting matter, he shows to the satisfaction of the court having cognizance of the case that he is using the best practicable and reasonable available means to render harmless the poisonous, noxious and polluting matter so falling, or flowing, or carried into the stream.

The act provides for summary remedies by injunction and penalties for default, and further, that nothing in said act shall legalize any act or

In *White v. Dixon*,¹ the plaintiff, as riparian owner, sued an iron mining company for fouling the water of the stream by pumping into it polluted water from their pits or shafts by means of drains leading therefrom into the stream. The defence was, in the first place, that if the water was not pumped into the stream in this way it would rise in the shaft until it reached the old levels from which it would flow into the stream. The water, the defendant averred, was the natural drainage water of the ground, not used in any manufacture and uncontaminated by any artificial process. And the defendant further pleaded that it was necessary for the working of their mines that the water should be so pumped and discharged.

The plaintiff prayed to have his right as riparian owner declared and the defendant enjoined.

The report is upon the plaintiff's motion for trial before the Lord Ordinary instead of a trial by jury. The motion was granted on account of "the legal questions of novelty and difficulty in reference to the rights of mineral proprietors to drain their workings."

The Lord Justice CLERK thought this was a good reason, because the water complained of was not an "opus manufactum." And Lord NEAVES said: "I do not say that the natural drainage of the ground is not pollution merely because it is not the result of a manufacture, if it be produced or used in an unusual way."²

default which would, but for the act, be deemed to be a nuisance, or otherwise contrary to law; and it appears that the act does not affect private rights and duties, nor does it concern the relation which riparian proprietors bear to one another: *Clerk & Lindell v. Torts*, 312.

¹ 2 Sessions Cases, Scotch, 4 Series, 904 (1875).

² The writer has, after diligent search, not been able to find any subsequent report of this case, discussing and deciding it on its merits. The reader may also refer to *Elwell v. Crowther*, 31 Beavan, 163; *Jagon v. Vivian*, 6 Ch. Ap., 758; *Wright v. Williams*, 1 M. & W., 77, where pollution from mine water seems to be considered as under the ordinary rules, though the report only concerns a question of pleading: *Wood v. Wand*, 3 Exch., 748. *MacSwiney on Mines*, 396, says a riparian owner may, by pumping water from his mines into a stream, "alter its quality in a reasonable degree," but "may not sensibly alter its quality." Authority for this somewhat ambiguous statement is wanting, and apparently no other writer is of like opinion.

If Justice WOODWARD, in 86 Pa. St., 401, had, in affirming the judgment of the lower court, recited the general rule on the subject of the pollution of streams as followed in *Howell v. McCoy*¹ and other cases, referred to the English cases above cited, and *Wheatley v. Chrisman*,² as applying the general rule to cases of mining and met the argument founded on the public importance of the case by the answer that the public welfare is better maintained by preserving the legal rights of the individual than by subordinating them to antagonistic interests however great—if his opinion had followed this line of thought the subsequent reversal would have been more difficult of accomplishment. But the opinion was founded in great part upon a case which seems, upon careful examination, to have no application—that of *Fletcher v. Rylands*.³

Having now reached a point where an analysis of *Rylands v. Fletcher* is necessary, that analysis, and considerations suggested by it, will form the subject of a second paper.

¹ 3 Rawle, 256.

² 24 Pa. St., 298.

³ 3 H. & C., 774; L. R., 1 Exch., 280, 8. C.; L. R., 3 H. L., 330.

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CASEY v. MILLER. SUPREME COURT OF IDAHO.

Novation—Statute of Frauds.

Where G owes C, and M owes G, C demands payment of G. G gives him an order on M. C agrees to release G provided M accepts order. M accepts order and pays \$45 thereon, and promises to pay balance at future time. M is released as G's debtor and becomes the debtor of C. M thereby accepts C as his creditor in place of G.

M, at request of G, agrees to pay to C money that he owes by contract to G. Such contract is not within the Statute of Frauds, requiring the promise to pay the debt of another to be in writing. M simply pays his own debt to a different person than the one he originally agreed to pay it to. He is paying his own debt, not the debt of another.

SYLLABUS BY THE COURT.

OPINION.

SULLIVAN, J. Miller was owing Gates, Gates was owing Casey, and Miller simply agreed to pay the sum of \$315 due from him to Gates, to Casey, or, in other words, he had agreed to accept Casey as his creditor instead of Gates. Miller did not, under said agreement, agree to pay the "debt of another," within the meaning of that term as used in the Statute of Frauds, but simply agreed to pay the debt owing by himself to appellant instead of to Gates. In *Barringer v. Warden*,¹ the Court, in referring to the Statute of Frauds, said "that the statute requires the promise to pay the debt of another to be in writing expressing the consideration; but this requirement has no reference to the promise by A to pay money that he owes by contract with B, to C. This is his debt, and the mere direction in which he pays it does not alter the character of the contract from the

¹ 12 Cal., 311.

original obligation. There is no difference between a debtor promising to pay his creditor directly so much money which he owes him, or promising his creditor to pay a third person the same sum, by an agreement between the three. The promisor is paying his own debt and his own obligation, and not assuming another's. . . . So, in the case at bar, Gates consented to such arrangement and gave Casey an order on the respondent. Casey assented to the arrangement by accepting the order; Miller assented by agreeing to pay the order."

WHAT PROMISES TO PAY THE DEBT OF ANOTHER ARE WITHIN THE STATUTE OF FRAUDS.

This recent case is a welcome one in its field, for by its clear language it helps to lessen the confusion which some less deliberate opinions in the long line of decisions on this subject have occasioned. The cases which have turned on the question whether a man is paying his own debt or another's are numerous, the decisions often conflicting, and the grounds on which the same conclusions are based, various.

The answer to the question is usually found by applying a test to the circumstances of each particular case. But, unfortunately, the authorities differ as to what that test should be. Sometimes it is the nature of the promise itself; if the promisor derives actual benefit from, or furthers his own interest by his promise, notwithstanding that he thereby discharges the debt of a third person, the first attribute prevails over the second, and his is a promise to pay his own debt, not within the Statute of Frauds, and need not be in writing. In some cases the fact of the third person continuing to be liable after the promise is made is supposed to be the proper criterion. The existence of a consideration

received by the promisor, the nature of such consideration, and the fact of its being expressed in writing, or not, are other examples of what has influenced the courts.

The two classes of promises in this connection are conveniently, if not always accurately, distinguished by the terms "original" and "collateral." The former is thus defined by the Court in *Nugent v. Wolfe*, 111 Pa., 480: "When the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the Statute of Frauds" and need not be in writing. "Collateral promises, where the object of the promisor is to become surety or guarantor of another's debt, or to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, are within the Statute of Frauds and not valid unless in writing."

In the following cases the decisions appear to have been based principally on the nature of the promise itself.

Barringer v. Warden, 12 Cal., 311 (1859). A owed money by con-

tract to B, and verbally promised to pay it to C in consideration of his release by B. The court held that the Statute of Frauds has no reference "to a promise by A to pay money he owes by contract with B to C. This is *his* debt; the mere direction in which he pays it not altering the character of the contract from an original obligation. There is no difference between a debtor promising to pay his creditor directly so much money which he owes him, and promising his creditor to pay a third person the same sum by agreement between the three. The last promisor is paying his own debt, and creating his own obligation, not assuming another's." *Barker v. Cornwall*, 4 Cal., 16.

Barker v. Bucklin, 2 Denio, 45 (1846). Plaintiff held a bond of one F. Defendant promised plaintiff, in consideration of his forbearing to sue F on his bond, that defendant would pay to plaintiff a sum of money which he owed F for a pair of horses, such sum to be in part satisfaction of the debt F owed the plaintiff. The court held that this promise was not within the Statute of Frauds as it was not a promise to pay the debt of a third person, but the payment of the promisor's own debt to a person designated by the promisor's creditor, who had, in fact, a right to make such payment a part of the contract of sale.

Runde v. Runde, 59 Ill., 98 (1871). A owed B and gave him his note for amount exceeding the indebtedness, secured by mortgage worth full amount of the note. A then became indebted to C, but could not pay. They all met together and agreed, that, by virtue of the claim A had on B for the difference

between the actual debt and the amount of the mortgage, B should pay such difference to C in satisfaction for what A owed C. *Held*, B's promise was an original undertaking to pay to C, not A's indebtedness to C, but his own indebtedness to A, and therefore not within the Statute of Frauds (*Darst v. Bates*, 95 Ill., 493).

McClaren v. Hutchinson, 22 Cal., 187 (1863). A was indebted to B for work done on A's farm. A sold his farm to C who agreed with A in writing to pay B what A owed him. Then B agreed verbally with C to release A from the debt and look to C for payment; B sues C. The Court ruled that the case was not within the Statute of Frauds. A being indebted to B for work done, and C being indebted to A for purchase money, A and C mutually agree that C shall pay A's debt and this arrangement is assented to by B. "Here is a mutual agreement by the parties interested, and it can make no difference that this mutual agreement was not perfected at the same moment of time, or that all were not present at the time of its completion. . . . B's assent to the agreement between A and C gave them a right of action against the defendant." *Rowe v. Whittier*, 21 Me., 349.

Robinson v. Gilman, 43 N. H., 485 (1862). A was indebted to B on promissory notes, C promised to B that if B would not bring suit on said notes and summon C as trustee of A, he would see that the notes were paid. As C was answerable as trustee for a large amount of A's property, the Court held that the debt he promised to pay was also his own debt and therefore not within the Statute.

Nugent v. Wolfe, 111 Pa., 471

(1886). Bank had obtained judgment against Power & Co. Nugent went security for Power & Co. for stay of execution upon said payment, being induced to do so by Wolfe, who verbally promised, in consideration therefor, to indemnify and save him "harmless from any loss or liability, and from paying anything by reason of his so going security." Judgment for defendant. Appealed. Affirmed. "The only consideration for the alleged agreement disclosed by plaintiff's offer is the disadvantage to him of the risk he incurred by becoming bail for stay of execution on the judgment against Powers & Co. In consideration of the risk or contingent liability thus assumed by plaintiff at defendant's request, the latter promised and agreed to pay the judgment, or see that it was paid by Powers & Co., and thus save the plaintiff from the necessity of paying the same.

... If it is not an agreement to answer for the debt or default of Powers & Co., it would be difficult to say what it is. Their liability to the bank still remained. The only consideration moving between the promisor and promisee, as claimed by the latter, is the risk he incurred in becoming bail for Powers & Co. There is no testimony, nor was any offered, to show that defendant had any personal interest in the judgment on which bail was entered, or that he held property or funds that should have been applied to the payment thereof. So far as appears, it was the proper debt of Powers & Co., and the substance of defendant's agreement is, that he would see that they paid it; and if they failed to do so he would pay it for them. It was literally a promise to answer

for the default of Powers & Co. Plaintiff's liability as bail for stay was merely collateral to the debt in judgment, and had in contemplation nothing but the payment thereof to the bank. The promise of defendant is within the Statute, and cannot be enforced because it is not in writing." *Ware v. Morgan*, 67 Ala., 467; *Underwood v. Lovelace*, 61 id., 155; *Beal v. Ridgway*, 18 id., 117; *Stryon v. Bell*, 8 Jones (N. C.), 225.

Brown v. Weber, 38 N. Y., 187 (1868). H had contracted in writing to build a mill for defendant, on defendant's land. After the frame had been erected, H contracted in writing with plaintiff that plaintiff should complete the building. Plaintiff began work but soon told defendant that he was afraid H could not pay him; defendant, by way of inducement, then verbally promised that if plaintiff finished the mill according to contract, he, defendant, would see that plaintiff would get his pay and lose nothing by it. *Held*, that the receipt or non-receipt of a consideration by the promisor was not always conclusive, and certainly not in this case. The question was whether the defendant made a contract with the plaintiff to finish the mill, or whether he merely became security that H should pay plaintiff for his work. The latter view accords with the facts of the case, and the promise not being an independent one, is void by the Statute of Frauds. It might perhaps be questioned if the defendant's interest in having the mill built on his own land is not sufficient benefit or advantage to himself to impart to his promise the character of an original promise: *Read v. Nash*, 1 Wils., 355; *Fish v. Hutchinson*,

3 Wils., 94; *Simpson v. Patton*, 4 Johns., 222; *Shingerland v. Morse*, 7 Johns. Rep., 463; *Skelton v. Brewster*, 8 Johns., 576; *Gold v. Phillips*, 10 id., 412; *Meyers v. Morse*, 15 id., 425; *Oimstead v. Greenly*, 18 id., 12.

In the following cases the courts have looked more toward the consideration as a means of settling the question. They have pointed out just how much or how little is necessary to constitute a consideration, which, when received by the promisor, will enable him to discharge what is apparently a third person's debt as if it were his own; that is, free from the statutory requirements governing the payment of another's debt.

Arnold v. Stedman, 43 Penna., 188 (1863). A sold land reserving the right of entry for non-payment of balance of purchase money on a certain date. Before this date S filed a mechanic's lien for building a barn for the vendee. A brought ejectment upon non-payment by vendee, which resulted in giving his vendee a year's more time in which to pay the balance; while this suit was in progress, A promised S that he would pay him the mechanic's lien when the property came back to him if S would stop proceedings on the lien. They agreed to this. Upon non-payment by the vendee when the time had elapsed, A sold the land to other parties, and S sued A for the amount of the lien. Judgment for plaintiff. Appealed. Affirmed. "Here, then, was a lien or claim upon property in which A had an interest, and it was a benefit to him that no proceedings should take place on the mechanic's lien held by S while his ejectment was in progress. The consideration, there-

fore, as regarded A for his promise was the benefit or advantage to himself arising from S's relinquishing proceedings upon his mechanic's lien. The consideration did not proceed from or to the debtor, but was an entirely new or fresh one between A and S, and was a new and original binding contract, A's object being not to answer for the debt of his vendee, but to subserve a purpose of his own. We do not, therefore, think the Act of 26th April, 1855, includes this case, and if such a defence were available, it would only sanction what would be a gross fraud on the part of the plaintiff in error."

Elkin v. Timlin, 151 Penna., 491 (1892). Defendant had contracted to sell his interest in land to plaintiff, and also the interest of a cotenant. Plaintiff objected to taking deed of the cotenant for fear there might be judgments against him. Defendant by way of inducement then promised to pay all of cotenant's judgments. The Court held that this was not a promise to pay the debt of another, but "an original undertaking to indemnify based upon a sufficient consideration." That consideration was self-interest. Defendant "was, at least, interested in effecting the sale of Wait's (cotenant's) interest in the land because the sale of his own interest depended on that. Plaintiff had agreed to buy both interests, but not either without the other." In line with this is the case of *Alger v. Scoville*, 1 Gray, 391.

See also *Malone v. Keener*, 42 Penna., 85; *Stout v. Hine*, 43 id., 30; *Whitcomb v. Kephart*, 30 id., 85; *Townsend v. Long*, 77 id., 143; *Fehlinger v. Wood*, 134 id., 525, where the promise was sustained;

and *Allhouse v. Ramsey*, 6 Whart., 331; *Shoemaker v. King*, 40 Pa., 107; *Miller v. Long*, 45 id., 394, where the promise was held to be void.

Emerson v. Slater, 1 Pet., 28 (1859). The plaintiff, a contractor, was under contract with a railroad company to build its road. Work ceased when company's credit was shaken. A stockholder of the company, the defendant, entered into a written contract with the contractor, that if the latter would pay him one dollar and complete the work as originally planned, he, the defendant, would pay him in cash and notes, the notes to be applied to the indebtedness of the railroad company to the plaintiff, and the agreement in no way to affect any contract of the plaintiff with the railroad. "Prior to the date," of the defendant's contract with plaintiff, "the railroad company had failed and was utterly insolvent, owning nothing, it seems, except the securities transferred to the defendant for his indemnity in this transaction, and the franchise of the road. Unlike what was exhibited in the former record, it now appears that the defendant had large interests of his own, separate from his relation to the company as a stockholder, which were to be promoted by the arrangement. He had loaned to the company railroad iron for the use of the road amounting in value to the sum of \$68,000, and, as a security for payment, held an assignment of the proceeds of the road to that amount with interest, which was to be paid in monthly instalments of \$3000. Now, unless the bridges were completed and the road put in a condition for use, there would be no proceeds; and as he had already taken into his possession all the

available means of the company to secure himself for this new liability, should the road not be completed, the company could not pay for the iron. In this view of the subject it is manifest that the arrangement was mainly to promote the individual interest of the defendant. We think it is clear that the promise of the defendant was an original undertaking upon a good and valid consideration moving between the parties to the written agreement."

Anderson v. Davis, 9 Vt., 136 (1837). B, a builder, contracted with A, the defendant, to erect a building; afterward B engaged C as his partner and both worked until B fell ill, and worked ceased. A then promised C to pay him for his work already done and what he should afterward do. C sues A for both sums on the verbal promise. "There was no original privity between A and C. A employed B and B employed C. To B alone could C look for his labor up to the time of the defendant's promise to the plaintiff. . . . If A became holden to C for this claim against B as collateral to B, and the claim still remained against B it (the promise) was within the statute. But if A was to assume the debt, and he alone be holden, and B to be discharged then the contract was not collateral, but independent, and not within the statute and required no note in writing, nor special action therefor. . . . Assuming that the contract was that C was to have no further claim on B, and that this was what constituted the consideration for A's promise together with C's continuing his work, this brings us to another point in the case." (Judgment for defendant reversing court below on a point of evidence.)

Nelson v. Boynton, 3 Metc., 396

(1841). A son promised that in consideration that the holder of a promissory note of his father would not sue upon it, to pay it himself. The Court held that this was not an original, but a collateral promise, for its principal object was not to benefit the son but the father. "Forbearance to sue is a good consideration for a written promise, but not such a consideration that would make the promise an original undertaking. "This is a collateral promise to pay the debt of another and void because not in writing. In the mind of the Court, then, the filial interest of a son in preserving his father's credit and saving the family name and honor from the risk of suffering reproach in a public court-room is not such a 'self-interest' as will support his promise to pay his father's just debts." This case is approved and followed in *Wentheimer v. Peacock*, 2 Iowa, 528.

Chandler v. Davidson, 6 Blackf., Ind., 367 (1843). A widow verbally promised to pay a debt owing to plaintiff by her late husband. "It is said, however, that considering her as being possessed of the goods under the will, she was under a moral obligation to pay the debts of the estate to the value of the goods, and that such obligation was a sufficient consideration for the express promise sued upon. . . . The promise was to pay, not the promisor's own debt, but a debt due by her deceased husband, and such a promise to be the foundation of a suit, must be in writing, by the Statute of Frauds unless the consideration be sufficient to give to the promise the character of an original undertaking. . . . There are cases, however, in which a new consideration passes at the time of

the promise between the newly contracting parties of such a character, that it would support a promise to the plaintiff for the payment of the same sum of money without reference to any debt of another. . . . But it is evident that the moral obligation relied on in this case was not a consideration of that description."

Bumford v. Purcell, 1 Green, Iowa, 488 (1854). "B as principal and P as security signed a note to D for town lots purchased by B. Before the notes matured, B proposed orally that he would relinquish the lots to P if P would pay the note and save B harmless. B soon after left the State. After judgment was obtained against P on the note he paid the same; and subsequently in a suit against B for the amount, B proposed to prove by parol the agreement under which P was to pay the note, and B relinquished to him the lots." *Held*, parol agreement void. Judgment for plaintiff. Appealed. Affirmed. "P was legally liable as surety to pay the note to the holder, but that liability did not exist between P and B. No consideration or agreement in writing had passed between them. B agreed to relinquish his right to the lots, but did not do so. A promise to release is not a relinquishment. A promise to pay is not a payment. Even an agreement in writing to answer for the debt of another has been held to be void if no consideration move between the plaintiff and defendant, either of forbearance or otherwise. *Elliot v. Giese*, 7 Har. & J., 458; *Leonard v. Vrendenburgh*, 8 Johns., 29; *Bailey v. Freeman*, 4 Johns., 280; *Tainney v. Prince*, 4 Pick., 385.

The bill of exceptions shows that the parties agreed to make an agree-

ment, but the agreement was not closed. Consequently the relation between the parties was not changed. If the promise in this case had been complete and absolute and founded upon an actual legal transfer of the lots to P in writing, that transfer coupled with P's liability to pay the note as security or indorser, would remove the case from the statute. In *Spann v. Baltzell, 1 Branch, 281*, it is decided that an absolute promise by an indorser of a note founded on a new and valuable consideration to pay the amount of such note to the holder, is not within the Statute of Frauds. . . . As the bill of exceptions shows that the defendant in this case did not propose to prove an absolute promise to pay the note founded on a new and valuable consideration, the Court very properly refused to admit parol proof of such promise."

Eddy v. Roberts, 17 Ill., 505.

Westheimer v. Peacock, 2 Iowa, 528 (1856). Peacock, Jr., had executed his promissory note and did not pay at maturity, whereupon the payees informed Peacock, Jr.'s, father that they would sue his son and attach the property. Father Peacock said he would pay the note if they would forbear to sue, and this was orally agreed to. Payees then assigned the note to plaintiff, who, relying on the verbal promise, brought suit against father Peacock. Verdict for plaintiff. Appealed. Reversed. "We think this is nothing more than one of those cases when A becomes the surety for the debt of B in consideration that the creditor will forbear to sue or to prosecute a suit already commenced. The agreement to forbear might be a good consideration to support the promise if in

writing, but not a consideration of such a character as to make a new and original transaction between the parties. There is nothing to show that the defendant, when he made the promise, had in view or secured a benefit which accrued immediately to himself. On the contrary, his object was to obtain forbearance or benefit to his son. If for his own benefit the promise would not be within the statute; if for the debtor, it would. And this distinction we think important and clearly recognized by the authorities."

The language of *Barker v. Bucklin, 2 Denio, 45*, may imply that forbearance to sue is a consideration sufficient to uphold a promise of a third person. "An agreement on the part of a creditor to forbear to sue a debtor is a good consideration to uphold a promise of a third person to pay the debt." This case also lays down the rule that "to constitute a valid agreement to pay the debt of another, therefore, there must be not only a good consideration, but the agreement must be in writing and must express the consideration. Both ingredients must concur or the agreement will be void."

Blunt v. Boyd, 3 Barb., 209 (1848). A was indebted to B for lumber amounting to \$87. C was indebted to A for work done. C agreed with A to pay the \$87 to B, and deducted that amount from what C owed A, giving A his note for the balance. Two of the three judges held that as no new consideration passed from A to C for A's promise to pay B, this was a collateral promise to pay the debt of another without consideration, and, therefore, void under the statute. This seems hard to reconcile with the views ex-

pressed in *Barringer v. Warden*, *supra*, and *Barker v. Bucklin*, *supra*.

The dissenting opinion was that C's promise was founded on his existing indebtedness to A for work done, and the consideration for the promise was that \$87 should be deducted from that debt to A, and his note made out for the balance. This practically amounts to saying that A's promise was an original distinct agreement to pay his own debt for a good consideration, and, therefore, was not within the Statute of Frauds. The latter view seems to be more in accord with the weight of authority.

Various examples of what the courts have declared to be valid considerations may be found in the following table, taken from *Robins v. Gilman*, 43 N. H., 485: "Cases where the promise has been held binding without writing: (1) where the debtor has put into the hands of the promisor the amount of his debt: *Hilton v. Dinamore*, 21 Me., 413; *Lawrence v. Fox* 20 N. Y., 6 Smith, 268; *Blunt v. Boyd*, 3 Barb., 209; (2) or transferred to him property equivalent: *Skelton v. Brewster*, 8 Johns., 376; *Gold v. Phillips*, 10 Johns., 412; *Farley v. Cleveland*, 4 Cow., 432; S. C., 9 Cow., 639; *Elwood v. Monk*, 3 Wend., 235; *Barker v. Bucklin*, 2 Denio, 45; *Pike v. Brown*, 7 Cush., 136; *Alger v. Scoville*, 1 Gray, 396; *Preble v. Baldwin*, 6 Cush., 352; *Todd v. Tobey*, 29 Me., 224; *Dearborn v. Parls*, 5 Me., 83; *Bird v. Gammon*, 3 Bing. (N. C.), 883; *Wait v. Wait*, 28 Vt., 350; *Olmstead v. Greeley*, 18 Johns., 2; *Meech v. Smith*, 7 Wendell, 317; *Gardner v. Hopkins*, 5 Wend., 23; *King v. Despard*, 5 Id., 277; (4)

ferred or released to the promisor some interest in the property of the debtor, as a lien given by law to a landlord upon the goods of his tenant for rent: *Slingerland v. Morse*, 7 Johns., 463; or of a bailee for services: *Mallory v. Gillet*, 7 Smith, 412; (5) or where the promisee has released to the promisor and holder of the property an attachment: *Cross v. Richardson*, 30 Vt., 642; (6) or where he has released to the promisor the right to attach the property of the debtor: *Sampson v. Hobart*, 28 Vt., 697; or where he has agreed to allow time to the debtor: *Smith v. Ives*, 15 Wend., 182; *Watson v. Randall*, 20 Id., 201; or has discharged a suit against him: *Rowe v. Whittier*, 21 Me., 545."

The subsisting liability of the third person has sometimes become an important feature in the decision of a case.

Sternburg v. Callanan, 14 Iowa, 251 (1861). A was doing business in his own name, and was indebted to the plaintiff. B and C entered into a partnership with A, the new firm assuming a large amount of A's indebtedness. A was soon after discovered to be insolvent and shortly retired from the firm, his original debt to the plaintiff remaining still unpaid. Plaintiff sued on a verbal promise made to him by C, that the new firm would pay off A's indebtedness. Judgment for plaintiff. Appealed. Reversed. "It is well replied by defendants that this promise, not being in writing, was void under the Statute of Frauds, and upon this ground the plaintiff could not recover. A promise to pay the debt of another, he still remaining liable, is a collateral promise and void. A promise to pay the debt of another for

which, *after* the promise, the other still remains liable, is within the Statute of Frauds, and must be in writing, or it is void. Under our statute no evidence of a contract is admissible, wherein one person promises to answer for the debt of another; unless such contract be in writing, and signed by the party charged, or his agent. But nothing in this provision shall prevent the party against whom the unwritten contract is sought to be enforced from being called as a witness by the opposite party, nor his oral testimony from being evidence. The plaintiff did not offer to bring this case within the exception by the introduction of the opposite party. If, therefore, C was authorized to act for the new firm, the contract sought to be enforced was within the Statute of Frauds, and the evidence tending to prove the parole promise should have been excluded."

Jackson v. Raynor, 12 Johns., 291 (1815). Payee of a promissory note was about to serve warrant on the maker upon default in payment, when the father of the maker informed him that "he would pay the debt, as he had taken his son's property, and meant to pay his honest debts." Payee then sued the father on this verbal promise. The Court said that the father was to be considered trustee for his son's creditor's, for he had received an assignment of his son's property in trust for the payment of his son's debts. "But, *the original debt of the son was still subsisting*; and, according to the decision in the case of *Simpson and Patten* (4 Johns. Rep., 422), and the authorities there cited, it seems well settled that a promise to pay the debt of a third person must be in writing,

notwithstanding it is made on a sufficient consideration." Judgment for defendant below. Apparently the Court was of the opinion that the trusteeship of the father amounted to a consideration for his promise.

The language of this case seems to furnish authority for the principle that a promise in writing to pay the debt of a third person, and on a sufficient consideration, is void under the statute if the original debt still exists.

This view has been criticised in later cases (see *Farley v. Cleveland*, 4 Cow., 432 (1808), and cases cited; *Allen v. Thompson*, 10 N. H., 32). Furthermore, the court seems to have unnecessarily gone out of its way to arrive at the conclusion that the promise was void on the ground of the continuing liability of the original debtor; it might have simply declared that here was a promise to pay the debt of a third person, not in writing, and that the trusteeship was not a consideration; for the father had not contracted a debt by becoming the assignee of his son's property for the benefit of creditors, nor did he himself receive any benefit or advantage by way of consideration: *Barker v. Bucklin*, 2 Denio, 58.

Farley v. Cleveland, 4 Cow., 432 (1808). A owed B on a note. C promised by parol to pay B, in consideration that A delivered to him (C) hay to the value of the debt. *Held*, not within the statute. "In all these cases founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff moving to the party making the promise, either from the plaintiff or the original debtor, the *subsisting liability* of the original debtor is no objection to the

recovery." On this point the court seems to differ from the opinions expressed in *Simpson v. Patten*, 4 Johns., 422; *Jackson v. Rayner*, 12 Johns., 291; but accords with the rulings in *Skelton v. Brewster*, 8 Johns., 376; *Gold & Still v. Phillips*, 10 Johns., 412; *Maule v. Buckwell*, 50 Pa., 39.

Leonard v. Vredenburg, 8 Johns., 29 (1811). One of the often-quoted cases on this subject is an early New York decision. A drew a promissory note in favor of B for the value of goods delivered to A from R. At the same time C went security, writing on the note, "I guaranty the above." The Court held: "It was all one original and entire transaction, and the sale and delivery of the goods to A, supported the promise of C as well as the promise of A. If the contract between A and B had been executed and perfectly *past* before C was applied to, so that his promise could not connect itself with the original communication, then the case would have been very different, and the undertaking of C would have required a distinct consideration. A mere naked promise to pay the already existing debt of another without any consideration, is void. But in the present case the promise was made at the time of the original negotiation between A and B. It was incorporated with that contract, and became an essential branch of it. The whole was one single bargain, and the want of consideration as between C and A cannot be alleged. "If there was a consideration for the entire agreement (and A's note purporting to be given for value received was evidence of it) *that* consideration was the aliment for the defendant's promise. . . . A's note given for value

received, and of course importing a consideration on its face, was all the consideration requisite to be shown. The paper disclosed that C guaranteed this debt of A's; and if it was all one transaction the value received was evidence of a consideration embracing both promises." The promise is, therefore, not within the Statute of Frauds. This case is much criticised, and severely so in *Maule v. Buckwell*, 50 Pa., 32. "It is not true, as a general rule, that the promise to pay the debt of another is not within the Statute if it rests upon a new consideration passing from the promisee to the promisor. A new consideration for a new promise is *indispensable without the Statute*, and if a new consideration is all that is needed to give validity to a promise to pay the debt of another, the Statute amounts to nothing. Nor can it make any difference that the new consideration moves from the promisee to the promisor. . . . There (*Leonard v. Vredenburg*) it was laid down that cases are not within the Statute where the promise to pay the debt of another arises out of some new and original benefit or harm moving between the new contracting parties." That this proposition is inaccurate, however, is almost universally admitted, and, as we have already remarked, it practically denies all effect to the Statute. It cannot be admitted for a moment in the terms in which it was expressed: Approved in *Townsend v. Long*, 77 Pa., 148. (See, also, *Dunn v. West*, 5 B. Mon., 381; *Lucas v. Chamberlain*, 8 B. Mon., 276.)

The preceding cases, when placed side by side, reveal the diversity of methods adopted by the courts for

the determination of what is at first sight a simple question. To select one test that would answer equally well on all occasions seems to be of doubtful possibility, for all that have yet been tried are open to some objection.

The courts frequently choose the easier plan of picking out a salient feature of the case, such as the subsisting liability of the "third person," and base their decision on this comparatively narrow ground without touching upon the broader and more debatable ground of the consideration and nature of the promise. While this course may be satisfactory enough in certain individual cases, it does not advance our knowledge of the underlying principles, for the reason that it does not penetrate to the foundation from which every one of these cases springs, namely, the promise itself.

As a test, the subsisting liability of the third person must often fail, for it frequently happens that, while the third person continues liable, the ulterior personal benefit or advantage to the promisor, derived from his promise, is tenfold greater than the amount of that third person's liability; and common sense would show that such a promisor was not paying another's debt, but assuming a personal obligation of his own to his very great advantage.

The consideration for the promise, on the other hand, has more advantages: it is an important feature where it consists of money transferred to the promisor with the understanding that the debt is to be paid out of that fund alone. The

objections to it as a basis of decision are, that it forces a line to be drawn as to just how much is necessary to constitute a consideration, thus leaving room for close and doubtful decisions, which will, in time, perplex rather than clarify the question. When the discussion is confined to the form or matter of the actual consideration which has passed, it is inevitable that cases should become narrowed down to fine distinctions, from which differences of opinion will not unnaturally arise.

It seems that the test which may be satisfactorily applied to the majority of cases is the nature and purpose of the promise itself. The various elements for consideration in this connection are the intent and object of the promisor in making the promise, the result to himself and the other parties to the transaction, the inducement he had to make it, the attendant, outlying, or prospective advantages that he has thereby obtained, or that he expected to obtain at the time he made it, it being immaterial whether they formed part of the actual consideration he received or not. It is plain that the nature of the consideration cannot affect the terms of the promise itself. The foundation on which the transaction is based is the promise; to examine all the circumstances which throw light on its purpose and character would seem to be the most natural and effective method of determining whether the promisor was paying his own debt or another's.

O. B. JUDSON.

DEPARTMENT OF WILLS, EXECUTORS, ADMINISTRATORS.

EDITOR-IN-CHIEF.

HON. WILLIAM N. ASHMAN,

Assisted by

HOWARD W. PAGE, WM. HENRY LLOYD, JR., MAURICE G. BELKNAP,
CHAS. WILFRED CONRAD, EDWARD BROOKS, JR., JOSEPH HOWARD RHOADS.

KING'S ESTATE. GAST'S APPEAL.¹

A receipt was given in the following words: "Received this day from ANN Charlotte Gast the sum of \$1 for all my services rendered her in her house up to this date; and I agree to let the legacy in her favor in my will as now made, stand and remain for her benefit at my death." The paper was signed and witnessed. *Held*, it is insufficient to establish such a contract as can be enforced against her estate, when it appears that the will in existence at the time the receipt was given has been destroyed or revoked.

There was nothing in the paper itself, nor in the evidence *dehors* the instrument to show the legacy was promised in consideration of services previously rendered or to be performed.

Such a contract can only be enforced, when upon a sufficient consideration, and clearly proved by direct and positive testimony, and where its terms are definite and certain.

Opinion by STERRETT, J.

Although on its face it would appear unreasonable that a man should be permitted, by contract, to limit the disposition of his property by will, a little reflection convinces us, not only of the propriety of the rule, but that it follows logically from the view taken by the law of all contracts, whereby a man disposes of that which is his own.

There can be no doubt of the abstract proposition that a person may enter into a valid agreement to make a will in a particular manner, or what is the same thing, not to make any will at all. The cases

have so held from the earliest time. In *Guilmer v. Battison*, 1 Vernon 48, decided by Lord KING, in 1682, the contract was: "If I die without issue of my body, I will give you either £500, or leave you my land." The agreement was insisted upon, and the Court decreed that it be enforced: *Jones v. Martin*, 3 Amb., 883; *Fenton v. Embers*, 3 Burr., 1276; *Fortescue v. Hannah*, 19 Ves., 67; *Johnson v. Hubble*, 5 AM. LAW REG. 177; *Rivers v. Rivers*, 1 Dames., 116; *Newton v. Newton*, 46 Minn., 33; *Thompson v. Stevens*, 71 Pa. St., 161.

¹ 150 Pa. St., 143; 30 W. N. C., 439. July 13, 1892.

The main difficulty arises in satisfactorily proving such contracts; and when proved, in applying a satisfactory remedy. The law has always held in abhorrence an attempt to charge a decedent's estate with contracts of a suppressed or private nature entered into during his life, and courts have always required proof of a very positive character to support them. This feeling is due to the inclination which exists among survivors, who are, perhaps, disappointed with the disposition which the deceased has made of his property, to recover as large a share of his estate as possible under the guise of assumed contracts and agreements entered into during his life. Also to the difficulty of denying such contracts when alleged, owing to the death of one of the most interested parties. This disposition of the court was well expressed by Justice STRONG, in *Graham v. Graham* (*post*), where he says: "The temptation to set up claims against the estates of decedents, particularly such decedents as have no lineal heirs, is very great. It cannot be doubted that many such claims have been asserted which would never have been known, had it been possible for the decedent to meet his alleged creditors in a court of justice. Not infrequently we witness a scramble for a dead man's effects, disreputable to those engaged in it, and shocking to the moral sense of the community. Such claims are always dangerous, and when they rest on parole evidence, they should be strictly scanned."

Covenants to make a stipulated disposition of property by will have long been used in England in marriage settlements, where a

person will covenant either to give a certain amount by will or otherwise, or that his executors, at a certain time after his decease, will pay a particular amount to the covenantee: *Mayd v. Field*, L. R., 3 Ch. D., 587; *Bold v. Hutchinson*, 20 Bev., 250.

But where it is sought so to hold a third person liable for representations made on marriage, they must be clearly proved, and it must appear that the marriage took place upon the faith of them: *Bold v. Hutchinson* (*ante*); *Jamison v. Stein*, 21 Bev., 5.

In America such settlements are not much used, and the cases upon contracts to make a will have generally arisen under different circumstances.

The Contract.—It is most important, where relief is sought for the breach of a contract to make a will, that it be fully proved. It must appear to have been a clear understanding between the parties, and deliberately entered into and understood by them. It is said in *Fry on Sp. Per.*, § 223, "such contracts are regarded with suspicion, and will not be sustained except upon the strongest evidence that it was founded upon a sufficient consideration, and was the deliberate act of the deceased." *Drake v. Lanning*, 24 Atlantic, 378; *Newton v. Newton*, 46 Minn., 32.

But certainty to a common intent will be sufficient, and where a person makes such representations as will in law amount to an offer, which are acted upon by the other party, a binding contract will be created: *Thompson v. Stevens*, 71 Pa. St., 161.

Thus, in *Hammersly v. De Biel*, 12 Cl. and Fin., 45, the agent of the father wrote to the gentleman

who was about to marry his daughter, "The father also intends to leave the sum of £10,000 in his will to Miss T. This arrangement is subject to revision, but it is sufficient for the Baron B. to act upon." He did act upon it, and the marriage was solemnized. *Id.*, that the estate of the father was bound by the contract: *Bold v. Hutchinson*, 30 Bev., 250; *Jamison v. Stein*, 21 Bev., 5.

Exactly what proof is necessary in a particular case is of considerable difficulty to state, but the rule is about the same as in any other contract except that the court will be more particular, and require stronger evidence where it is to make a will than in ordinary cases: *McClure v. McClure*, 1 Pa. St., 374; *Mundorf v. Kilbourn*, 4 Md., 459.

It has been said "The burden of proving such a contract and showing its exact terms is upon the party asserting it:" 11 Pa. C. C., 493.

Quite a line of cases has arisen upon contracts that, if the plaintiff will live with the deceased and care for him during life, he shall have certain property at his death. Such claims are particularly obnoxious to the courts, especially since the proof which is generally produced is of the most unsatisfactory character. "Courts," said Justice SWANWOOD, in *Thompson v. Stevens (anl)*, "by which the estates of deceased persons are called upon to pay large sums to nurses and housekeepers, ought to be very closely scanned, and juries instructed that they can only be made out on very clear proof. Courts are especially justified in setting aside such verdicts when not founded upon proof of this character, or when unreasonable in

amount." Such a case was *Graham v. Graham*, 34 Pa. St., 475. The deceased, being old, promised his nieces that if they would live with him till he died he would "give them as much as any relation he has on earth," without suggesting what that amount would be. The mother gave testimony as to the conversation with the uncle at the time the alleged contract was made, which tended to prove it, and another witness testified to admissions by the deceased of having made such a contract. They were all of a loose and rambling nature, and the court refused to enforce it, saying it was too uncertain. In *Cesana v. Miller*, 51 N. W., 50 (Ia., 1892), the action was to recover a farm on the ground that the deceased had promised that if plaintiff lived with her and took care of her she should have it at her death. Several witnesses testified to statements by the deceased to the effect that the plaintiff was to have the farm. But the court held it insufficient to establish any binding contract. To the same effect are: *Pollock v. Ray*, 85 Pa. St., 428; *Walls' App.*, 111 Pa., 460.

But where the evidence reaches the degree of certainty required by the court, or, as has been said, where the evidence is "direct and positive," the necessary relief will be granted, for although the strict rule has been found expedient in order to protect the estates of deceased persons, it will not be permitted to work an evil upon those who have entered into an honest contract with him: *Thompson v. Stevens*, 71 Pa. St., 161; *Cottrell's Estate*, 2 W. N. C., 337.

These cases are only a step removed from those where the services are rendered simply on the

hope of reward by will, and without any agreement for compensation at all. Such claims are never allowed and no recovery can be had for such gratuitous services: *Osbourne v. Guy's Hospital*, 2 Strange, 239; *Martin v. Wright*, 13 Wend., 460; *Mullin's Estate*, 136 Pa. St., 239.

Like all other contracts, an agreement to make a testamentary disposition of property must conform to the Statute of Frauds, so that a contract for the disposition of land by will, to be enforceable must be in writing, or must avoid the statute on the ground of part performance: *Harler v. Harder*, 2 Searl. Ch., 19; *Johnson v. Hubble*, 5 Am. Law Rep., 177; *Brinker v. Brinker*, 7 Barr., 33; *Gould v. Mansfield*, 103 Mass., 408; *Drake v. Lanning*, 24 Atl. Rep., 378.

But if the contract can be collected from the letters which have passed between the parties, the statute will be satisfied: *Hammersley v. De Bell*, 12 C. & F., 45; *Austin v. Davis*, 128 Ind., 473.

So, too, the will itself executed in pursuance of an agreement, may operate as a writing within the statute. It is merely a will, however, and revocable during the life of the maker, unless possession be taken under it, and the plaintiff fulfill his part of the agreement, in which case it amounts to an executed contract, which is irrevocable and may be enforced even during the life of the maker: *McCue v. Johnson*, 25 Pa. St., 306; 34 Pa. St., 180; *Tuitt v. Smith*, 127 Pa. St., 341; 137 Pa. St., 35; *Brinker v. Brinker*, 7 Pa. St., 33.

The doctrine of part performance as a method of avoiding the hardships which would be occasioned by strict enforcement of the Stat-

ute of Frauds, has been universally applied to this class of contracts, but what is a sufficient part performance in a particular case is a harder question. As before stated, the contract must be clearly proved, and the acts set up to take it out of the statute must be "unequivorally in performance of the contract," and referable thereto: *Carlisle v. Flemming*, 1 Harrington, 421.

In England it has been held that marriage entered into upon the promise of the deceased that he would by will give the plaintiff certain property is not sufficient to take the case out of the statute. This was ruled in *Caton v. Caton*, 1 R., 1 Ch. App., 137; L. R., 2 H. L. C., 127. Where negotiations for a settlement were broken off upon the promise by the deceased that he would by will give his wife all her property. The marriage was solemnized upon this promise, but the husband died without having made the will agreed upon. The court held that the contract was within the English statute requiring that a contract upon the consideration of marriage must be in writing, and that the marriage was not sufficient part performance to take the case out of it, and, therefore, the contract could not be enforced: *Coals v. Pilkington* L. R., 19 Eq., 174.

This decision rests upon the peculiar provisions of the English statute, which would be rendered meaningless by any other conclusion. Generally, in the United States, this clause is not in force, and the rule would probably be different were a similar case to arise.

Where the agreement is that if the plaintiff will work the farm during the life of the deceased, it

shall be given to him at his death, and relying upon this promise the plaintiff enters into possession and cultivates the farm, and expends money upon it, he will be entitled to specific performance of the contract, even though it be not in writing: *Brinker v. Brinker*, 7 Pa. St., 53; *Young v. Young*, 45 N. J. Eq., 27; *Smith v. Pierce*, 25 Atl. Rep., 1092 (Vt.).

But the mere expenditure of money alone will not take the case out of the statute, unless it be clearly in pursuance of an express contract; *McClure v. McClure*, 1 Pa. St., 374.

So if the contract be that if the plaintiff will live with the promisor for a certain time, and he do so, the contract will be enforced. Not only so, but where the contract was made between the deceased and the parent of an infant child, the court will enforce it in favor of the child. Such a case was *Van Dwyne v. Vreeland*, 11 N. J. Ch., 370; 12 Id., 142. The father of an infant child orally agreed with its uncle that the child should live with the uncle during his life, and that he should receive all the uncle's property upon the death of himself and wife. The child lived with the uncle twenty-three years, and the uncle having made a conveyance clearly in fraud of the agreement the court set it aside, and granted specific performance of the original contract. The contract, although parole, was taken out of the statute by the infant having performed his part of it. The same conclusion was reached in *Sharkey v. McDermott*, 91 Mo., 647; *Van Tine v. Van Tine*, 13 Central Rep., 354.

Directly opposed to these is the decision in *Anstin v. Davis*, 126 Ind., 473, decided in 1891. An in-

fant was adopted by a man, with his wife's consent, in pursuance of a contract so to do, and to leave her all his estate at his death. The deceased made a *bona fide* conveyance of all his property to his wife, and shortly after died. The wife renewed the promise by parole, but died without making any such disposition. *Held*, the contract was within the Statute of Frauds, and although the infant had lived with the deceased according to the agreement, it constituted no such part performance as would avoid the statute. The decision, however, is confessedly upon the former cases in the same State, and no outside authorities are cited to support it, so it can hardly be considered as affecting the general rule, especially as the doctrine of part performance is, as a whole, recognized.

Where two parties agree to make mutual wills, and one dies without either will having been revoked, or the contract having been discharged, the other party will not be permitted to make a different disposition of his property from that agreed upon. *Williams on Ex.* (6 Am. Ed.), 12 and 13, 162-3.

In such a case, where, after the death of one of the contracting parties the other made a different will, Lord CAMDEN, in giving relief to the injured parties, made use of the following language, which would seem to express the true reason of the rule: "It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies carries his part of the contract into execution. Will the court afterward permit the other to break the contract? Certainly not." *Dufour v. Pereira*, 1 Dick., 419.

A similar case arose in *Lord Wal-*

pole v. Lord Orford, 3 Vesy Jr. 402, and the relief prayed was denied because of the general uncertainty of the case, and not from any objection to the theory.

So in *Carmichael v. Carmichael*, 72 Mich., 76, the agreement to make mutual wills was parole between husband and wife, and the husband died leaving a will made in pursuance of the contract. The wife, having accepted the provisions of the husband's will, was restrained from doing any act whereby it would be impossible for her to carry out her part of the agreement, upon the express grounds that "Having accepted the terms of the husband's will, the contract was sufficiently part performed to be taken out of the statute of frauds." But the mere making of a will in pursuance of such a contract will not be sufficient part performance to prevent a revocation by either party during their joint lives: *Gould v. Mansfield*, 103 Mass., 408.

Consideration.—Like all other enforceable contracts, whether or not within the Statute of Frauds, a contract to make a will must be on a sufficient consideration, either by way of advantage to the one party or detriment to the other: *Drake v. Lanning*, 24 Atl., 378; *McClure v. McClure*, 1 Pa. St., 374; *King's Estate* (principal case).

Any valuable consideration will be sufficient, and this will include marriage: *Robinson v. Ommannly*, L. R., 21 Ch. D., 78, C. A., 23 Ch. D., 205; *Johnson v. Hubble*, 5 Am. Law REG., 177; *Caton v. Caton*, L. R., 1 Ch. App., 137.

So services rendered, or to be rendered will be sufficient: *Snyder v. Carter*, 4 Yeats, 353.

And in the case of an agreement

to make mutual wills, the reciprocal promises will be sufficient: *Carmichael v. Carmichael*, 72 Mich., 76.

In short, the rule laid down by *LORD COTTONHAM* in *Hammersly v. De Reil* (*ante*), would seem satisfactory. It is: "A representation made by one party, for the purpose of influencing the conduct of the other party, and acted on by him, will, in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representations:" *Coals v. Pilkington*, L. R., 19 Eq., 174.

In *Ridley v. Ridley*, 11 Jur. N. S., 475, the plaintiffs sold land to "A," who was the partner of the deceased, upon the promise of deceased that he would give the plaintiffs the value of the land in his will. This he failed to do, and Sir JOHN ROMILLY held, that since the contract was clearly proved, and it appeared that for various reasons the deceased was anxious to have the sale made, that the consideration was sufficient, and the contract would be enforced. So in *Van Duyne v. Vreeland* (*ante*), a child having gone to live with an uncle upon the understanding that he was to receive the uncle's property at his death, the giving up of his interest in his own father's estate was held to be a sufficient consideration to support the promise: *Hedley v. Simpson*, 20 S. W., 881.

A much stricter rule, however, was laid down by the Court of Chancery of New Jersey in *Drake v. Lanning*, 24 Atl., 378. The contract was that if the plaintiff would continue to live upon the farm, and find a purchaser for a first mortgage there was upon it, the deceased would, by her will, release a second

mortgage, which she held, and also provide funds to pay the said first mortgage. The plaintiff accordingly fulfilled her part of the contract, but the deceased failed to make the proper will. The court decreed that since the agreement was all to the advantage of the plaintiff, and for her benefit, there could be no recovery. Although the decision is a harsh one, it could probably be explained by the circumstances of the particular case, were it not that the court expressly differs from *Loffus v. Maw*, 8 Jur. N. S., 607, and *Coals v. Pilkington (ante)*, both of which follow Lord COTTONHAM's rule, and would seem like extremely fair decisions. In the latter the deceased promised that if the plaintiff would give up her prospect of going into the millinery business, she should have her house during life in which to take boarders. This she did, and occupied the house till the death of the promisor. Vice Chancellor Malins decreed that she should have the house during her life according to the contract. Although the Vice Chancellor "has the misfortune to be frequently overruled," the decision would seem like a sound one, following closely as it does, the earlier cases; and the rule established would seem to be more reasonable than that of the New Jersey Court.

Effect Upon the Promisor.—The effect of such an obligation upon the person making it, has given rise to some interesting discussion. If the contract is to be enforced upon the death of the promisor, shall it not bind him during his life so that he shall not do any act whereby the performance of the agreement on his death shall be rendered impossible? The ques-

tion has seldom arisen, but where the contract is intended to bind the present property of the parties, or to effect their immediate actions, it will generally be enforced: *Lewis v. Madlock*, 8 Ves., 156.

So the court will grant an injunction to restrain the offending party from doing acts which would render the performance of the contract impossible when the proper time arrives, and will set aside, as fraudulent, conveyances which would have that effect: *Austin v. Davis*, 128 Ind., 473; *Bird v. Pope*, 73 Mich., 483.

(The cases under this head have been more fully noted in other parts of this note.)

The effect of a covenant to make a will in a particular manner was before the court in *Needham v. Kirkman*, 3 B. & Ald., 531. "A" covenanted with the trustees of a settlement he had just made, that he would, by will or otherwise, "give and devise all other his real estate and personal estate to, and among, his children, etc." Subsequently, having made an agreement to sell certain of his land, objection was made to the title on account of the covenant. *Held*, that it applied only to the real estate of which he died possessed. Affirmed in *Needham v. Smith*, 4 Russ., 318.

In a case of the kind, however, although the promisor is only bound to dispose of that which he possesses at his death, and retains full control of the property during his life, he will not be permitted to make a contrary disposition in his effect testamentary, or which will be in fraud of those entitled under the agreement: *Fortescue v. Hannah*, 19 Ves., 67; *Randall v. Willis*, 5 Ves., 362; *VanDuyne v. Vree-*

land. 11 N. J. Ch., 370; 12 Id., 142; Austin v. Davis, 128 Ind., 473.

But where a person covenants to let an existing will remain, and subsequently marries, although the marriage will *pro tanto* revoke the will, and so cause a breach of contract, it is said that no action will lie: Pollock on Contracts, 308.

Remedy for Breach.—The remedy in case of the breach of a contract to make a will, of course varies with the relief sought. At law the action is simply for the damage occasioned by the breach, or, perhaps, in a proper case, an action would lie for the specific recovery of the property promised: Newton v. Newton, 46 Minn., 33. The important question at law, therefore, is the measure of damages. In equity the courts have endeavored fairly to adjust the rights of the parties, and suit the relief to the particular case. It was said by Justice ROCHES, in Logan v. McGinnis, 12 Pa. St., 27, where the agreement was in writing: "Had the will not been made, equity would, no doubt, decree a conveyance, and a jury would give damages to the amount of the value of the land." This is, no doubt, true, where the contract is completely made out, and specific performance will be decreed of a contract to make a will where the intervening equities do not prevent it, and in those cases the parties will be put in as nearly the position they before occupied as possible: Parsons on Contracts, 563 (n); Waterman on Sp. Per., § 41; Young v. Young, 45 N. J. Eq., 27; Sharkey v. McDermott, 91, No. 647.

In Johnson v. Hubble, 5 AM. LAW REG., a young man having conveyed to his sister certain land,

in pursuance of a contract with the father, that upon his death he would make an equal distribution of his property between the brother and sister, which he failed to do, but gave it all to the sister, the court held that although specific performance could not be decreed because the sister was not a party to the contract, yet she would be compelled to reconvey the land which the brother had conveyed to her as a consideration for the promise with the father. So in Lisle v. Tribble, 17 S. W., 742 (Ky.), where a note had been given to the promisor, on the agreement that he would, by will, give the plaintiff its value in land. This he failed to do, and recovery was allowed upon the note on the ground that the consideration for the gift of it had utterly failed: De Moss v. Robinson, 46 Mich., 62.

Where the covenant simply is to give a certain amount of money or property, or an amount which may be rendered certain, the court will allow a recovery for such an amount: Mayd v. Field, L. R., 3 Ch., 547; Thacker v. Key, L. R., 8 Eq., 408; Thompson v. Stevens, 71 Pa. St., 161; Cottrell's Estate, 2 W. N. C., 237.

So where the contract was to give an amount equal to what he should give to his younger children, the trustees of the settlement were entitled to recover an amount sufficient to make the share equal, having respect to advancements already made: Wells v. Black, 4 Russ., 170.

So where the promise is to compensate for services rendered, or to be rendered, by a provision in the will, or by a definite portion of the estate of the deceased, it would appear that the

injured party, in addition to his action for specific performance, where that is possible, would be entitled to recover on a *quantum meruit* for the reasonable worth of his services: *Patterson v. Patterson*, 13 Johns., 379; *Hudson v. Hudson*, 13 R. R., 583 (Ga.).

Indeed, this form of action would seem to be the most favored, as the courts will require very clear proof of a contract to give a distributive share of the estate, and in Pennsylvania would almost seem to doubt the right to recover it at all: *Graham v. Graham*, 34 Pa. St., 473; *Pollock v. Ray*, 85 Pa. St., 428; *Wall's App.*, 111 Pa. St., 460; *Thompson v. Stevens*, 71 Pa. St., 161.

If the will be made in accordance with the agreement, there can be nothing more required: *In re Brookman's Trust*, L. R., 3 Ch. App., 183.

So where a son remained with his father, under the expectation that he would be compensated by will, but leaving the amount discretionary with the father, it was held in analogy to ordinary contracts of hiring that he must be satisfied with any provision which may be made, whether it be what was expected or not: *Lee's App.*, 53 Conn., 363; *Eaton v. Benton*, 2 Hill, 578.

Owing to the peculiar wording of our Statute of Frauds, although the land itself cannot be recovered upon a parole contract, there is nothing to prevent an action of damages for the breach. The only

question was as to the measure of damages. In the early cases where the contract was oral to give land by will in payment for services, the court distinguished between a contract for the sale of land, and a contract to compensate for services in land, and made the measure of damages in the latter case the value of the land at the time it should have been given, or at the death of the promisor: *Baah v. Baah*, 9 Pa. St., 263; *Jack v. McKee*, 9 Pa. St., 235; *Burlingame v. Burlingame*, 7 Cowen, 92.

But it was soon seen that this was in effect allowing a recovery of land upon a parole contract. This was shown in the dissenting opinion of Justice Woodward, in *Melan's Ad. v. Ammon*, 1 Grant, 123, and when four years later *Hertzog v. Hertzog*, 34 Pa., 475, was argued, the *personnel* of the court having much changed, the old rule was abandoned, and the new one of Justice Woodward adopted. It is expressed thus: "A man who contracts for land, and pays the price, but loses it without fraud of the vendor, can at most only recover back his money, or the value of his services rendered, if this is the form in which the consideration was paid." The same change has gone on in the other States, so that now the value of the land has no place in fixing the damages, and an action only lies for a recovery of the consideration paid: *Wallace v. Long*, 105 Ind., 522; Read on Statute of Frauds, 11, 728.

C. WILFRED CONARD.

DEPARTMENT OF PRACTICE, PLEADING AND
EVIDENCE.THOMPSON v. PEOPLE.¹ SUPREME COURT OF ILLINOIS.

EDITOR-IN-CHIEF.

(The nature of the subject of this annotation makes it improper that Judge DALLAS' name should be connected with it. The general editors are alone responsible.)

Assisted by

ARDENUS STEWART. HENRY N. SMALTZ, JOHN J. MCCARTHY.
WILLIAM SANDERSON FURST.*Trial—Absence of Judge.*

It is reversible error for the judge, during the argument of the case before the jury, to go out of the court-room to a private room where he cannot hear the argument nor pass on objections made by the prisoner's counsel to the statements of the State's attorney.

STATEMENT OF FACTS.

John K. Thompson was indicted for assault with intent to kill, and was convicted. During the argument of the case before the jury, the trial judge left the court-room and remained out of the court-room during the entire closing argument of the State's attorney. The judge had retired for the purpose of preparing his instructions to the jury, but he could not, and the record shows, did not, hear the argument to the jury. Counsel for the defendant repeatedly objected to the remarks of the State's attorney, but as the judge was absent from the court-room and there was no presiding judge present to pass upon the questions raised, or attempted to be raised, they were never decided. Upon these facts CRAIG, J., said: "The argument before the jury is a part of the trial of a cause as well as the introduction of evidence to prove the innocence or guilt of a defendant, or any other fact at issue in the trial. If the

¹ 32 N. E. Rep., 968 (1893).

presiding judge may leave a court-room and engage in other business during the argument before the jury, he may upon the same ground leave while the evidence is being introduced during the progress of the trial, at any any other stage of the proceeding. . . . Under the law the defendant, who was on trial for a serious crime—one which deprived him of his liberty—had the right to the presence of the presiding judge during the argument of the case before the jury, and the absence of the judge was, in our opinion, an error of sufficient magnitude to reverse the judgment."

MISCONDUCT OF A JUDGE AS GROUND FOR NEW TRIAL.

The purity of the judiciary is the perpetuator of order and equality. When the bench becomes the object of criticism and contempt, the death warrant will be read to an institution which the civilized world recognizes to-day with awe and admiration. To the honor and credit of the judiciary, be it said that its decorum has been, as a rule, worthy of its praise; but instances of misconduct, legal, if not wilful, may be noted which the law recognizes as culpable and affording sufficient ground for granting a new trial.

Absence of the Judge during Trial.—The record in *Meredith v. People*, 84 Ill., 479, homicide, shows that the judge of the Circuit Court before whom the cause was tried, during the argument before the jury was absent for nearly two days from the court-room and employed in the trial of other causes in an adjoining room, and his place upon the bench was occupied successively by two members of the bar. Justice SCOTT in setting aside the verdict said: "It is not material whether the judge of the Circuit Court was absent from the court-room during the trial of the

cause by consent of counsel for the defense. Neither accused nor his counsel for him could consent that the judge of the court before whom the cause was being tried might be elsewhere employed in other official duties. It is no less error than if he had been in another county. Where the judge is engaged in trying causes, there is the court, and he can hold no court elsewhere by proxy at the same time. . . . This court has decided in two civil cases that a member of the bar, even with the consent of the parties, cannot exercise judicial power." See also *Cobb v. People*, 84 Ill., 511.

Private Communications between Judge and Jury.—It is a well established and salutary rule, and one very essential to the proper and effectual administration of justice, that the instructions of the judge to the jury should be openly and publicly imparted. The right of a suitor to have the trial of his cause conducted openly, with the opportunity to be present and to except to and review any unwarranted instruction or procedure, is a substantial one, and if any infraction of it occurs the burden rests

upon the party maintaining the regularity of the proceedings to show that the communication or act or question could not have tended to the injury of the defeated party. If it appears affirmatively and beyond dispute that the instructions, instead of being prejudicial to the party complaining were really favorable, to him and could not have worked any injustice, or in any way have affected the result, or if the irregularity has been cured by the waiver (see *Alexander v. Gardiner*, 14 R. I., 15) or assent of the party alleging it, it is not a sufficient reason for ordering a new trial; but it may be stated generally that the party moving for a reversal is not required to show affirmatively that the communication tended to his hurt, the principle underlying the rule being that such communications are so dangerous and impolitic that it should be presumed conclusively that harm was done. The source of the danger lies in the secrecy attending the act. *Graham and Waterman on New Trials*, Vol. II, p. 360, say: "The practice of the courts addressing private notes to the jury cannot be sufficiently condemned." In *Watertown Bank v. Mix*, 51 N. Y., 559, the judge answered somewhat vaguely a written question relating to the evidence sent to him by the jury, by writing his answer beneath and returning it, but without informing counsel. *JOHNSON, C.*, said: "It is, in my opinion, better and safer to adhere to the rule as affirmed by the adjudged cases and by what I understand to be the settled usage in this State, that there ought to be no communication between the judge and jury after they have gone from the bar to consider

of their verdict, in relation to the oral evidence or his instructions to them, unless it take place openly in court or with the express consent of the parties." In *Sargent v. Roberts*, 1 Pick., 337, the Court said: "We are all of the opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the Court unless in open court, and where practicable in the presence of the counsel in the case."

Wiggins v. Downer, 67 How. Pr., N. Y., 65, a leading case, reviews the authorities. Here the jury returned to *open* court at the close of the evening session, when neither parties nor counsel were present, and requested the Court to repeat certain propositions, which was granted. The attendance of counsel was impossible. Verdict sustained. See also *Goldsmith v. Solomons*, 2 Groble, S. C., 296; *Rogers v. Moulthrop*, 13 Wend., N. Y., 274.

A distinction has been drawn between a written communication to the jury involving law and one involving fact. In *Thayer v. Van Vleet*, 5 John., N. Y. 111, a justice's court jury while deliberating sent for the justice, who entered their room and answered a question of law: *Held*, no such misconduct as commended a new trial. See also *Allen v. Aldrich*, 29 N. H., 63; *School Dist. v. Bragdon*, 23 N. H., 517. And the judge may give written instructions to the jury after they have retired, at their request, upon questions of law, even in the absence of counsel: *Shapely v. White*, 6 N. H., 172; *Basset v. Salisbury Co.*, 28 N. H., 438. But

in *Plunkett v. Appleton*, 51 How. Pr., N. Y. 469, a verdict was set aside because the judge, without the knowledge of counsel, sent written communications to the jury answering questions of law addressed to him by the jury. A reversal was allowed in *Bunn v. Croul*, 10 Johns., N. Y., 239, where the question was one of fact and not a matter of law. See also *Mahoney v. Decker*, 18 Hun., N. Y., 365. In *Neil v. Abel*, 24 Wend., N. Y., 185, the judge was reversed because he permitted the jury, without the consent of the parties, to use his minutes sent for by them. *Similliter*, *State v. Alexander*, 66 M., 148.

In *Shapely v. White*, PARKER, J., said: "The principle to be deduced from these cases seems to be a sound one. If the jury, after an adjournment, put a question respecting the facts of the case to the court, it will be irregular to state the evidence relating to it; but if they desire instruction upon a mere question of law, that may be answered. It should undoubtedly be answered in such a way that the parties may have an opportunity to have it corrected if there is any error in the answer, and in this way all the rights of both parties are secured as effectually as if the answer was given in open court."

In *Taylor v. Betsford*, 13 Johns., N. Y., 487, the justice went into the jury room and deliberated with them privately and apart from the parties and without their consent. Judgment reversed. See also *Benson v. Clark*, 1 Con. (N. Y.), 258. The Court, in *Hobery v. State*, 3 Minn., 262, said: "A judge has no more right to communicate with a jury after it has retired than any other person, and we must look upon his

visit in this case in the same light that we would view the entry of any third person into the jury room while the jury was in consultation." The Court, in *Wiggins v. Downer*, 67 How. Pr., N. Y., 65, said: "From these cases and others of like character that might be cited, it is clear that a judge should not privately communicate with the jury, either by entering the room where they are deliberating or by means of written communications. The principle upon which the rule rests is that such communications are so dangerous and impolitic that they will be conclusively presumed to have influenced the jury improperly. The source of the danger is the secret nature of communication." But see *Thayer v. Van Vleet*, 5 Johns., N. Y., 111.

Intoxication of the Judge.—Such culpable decorum is undoubtedly ground for a new trial. Says the court, in *Repath v. Walker*, 13 Col., 109: "It would be better to submit questions in dispute to the arbitration of chance than to the decision of a tribunal which is not thoroughly upright and scrupulously fair as between litigants; and can it be said that an upright judge, a scrupulously fair man, one who appreciates the dignity of his office, can impartially determine the interests of litigants and fairly administer the law when in a state of intoxication. Such conduct on the part of a judge is not only reprehensible, but is indeed criminal."

Judicial Recognition of Scandal.—In *Rickabus v. Gott*, 51 Mich., 227, the trial judge permitted to be admitted needless scandal and gratuitous attacks on the character of a party. Upon reversal the

Supreme Court said: "There was no color of excuse for the practice. It was equally a violation of propriety and the rules of evidence. It was not only hearsay, but irrelevant, and could have no other object than to wound and disparage the proponent. . . . The testimony had no legal connection with the question that was being tried, and the end to which it was obviously directed is utterly indefensible. The duty of the trial judge to repress needless scandal and gratuitous attacks on character is a very plain one, and good care should be taken to discharge it fully and faithfully."

Misconduct of Court toward the Evidence.—In *Belmore v. Caldwell*, 2 Bibb, Ky., 76, the judge refused counsel permission to argue a question of fact before the jury. Upon reversal the Supreme Court said: "The right of appearing by counsel and arguing matters of fact involved in the cause is a right which the Court ought not to have denied to the party." Similarly *Olds v. Com.*, 3 Marsh., Ky., 467; *Hunt v. State*, 49 Ga., 235.

Attitude of Judge—The manner and demeanor of the judge which indicates a bias and obviously influenced the jury will afford ground for a new trial. In *Wheeler v. Wallace*, 53 Mich., 355, the trial judge apparently sanctioned an abuse of cross-examination, the purpose of which was to entrap a witness into making inadvertent statements; volunteered his own notion of the purpose of a question; reflected before the jury upon the capacity and memory of counsel; and stated as a fact, when there was doubt about it, that a witness had sworn to a particular statement. Chief Justice COOLEY, upon

reversal, said: "It is very unusual to have exception taken on writ of error to the manner and deportment of the trial judge in the conduct of the trial, and under ordinary circumstances a court of review would not scrutinize very closely his methods when no error in his rulings was alleged. Still, it is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition to the jury of his own opinions in respect to the parties or to the case."

State v. Richards, 72 Io., 17, was reversed by the higher court because the judge's charge was prejudicial to the defendant as tending to impair his credibility as a witness when it was possible for the jury to reconcile it with the evidence of other witnesses.

Remarks of Court to Counsel.—It is misconduct, warranting a new trial, for the Court to compliment one attorney to the detriment of the other, or to resort to language which unjustly casts a stigma upon counsel, or where his remarks to an attorney show an unfavorable opinion toward either party to the suit.

In *McDuff v. Journal Co.*, 47 N. W. Rep., 671, the Court said: "I don't want to compliment Mr. Pound (the plaintiff's attorney), but I am well aware of the fact that Mr. Pound knows how to try a law suit." Judgment reversed. Upon exceptions to the court's remarks to counsel during trial and argument, Judge SARKWOOD, in setting aside the verdict of *Crankhite v. Dickerson*, 51 Mich., 177, said: "It is insisted by the defendant's counsel that these suggestions by the Court were calculated to make an

impression unfavorable to the defendant, upon the minds of the jury. Of course, nothing of the kind was intended by the court; still, we think, the suggestions open to the criticisms made by the defendant's counsel, and it is impossible to tell to what extent the defendant's rights may have been prejudiced by the remark. Certainly, the natural tendency was in that direction, and in this there was error. Jurors are very vigilant in scrutinizing all that is said by the trial judge in the progress of a cause before them, and great care should be observed that nothing is said which can, by any possibility, be construed to the prejudice of either party. Courts cannot be too circumspect in this regard." See, also, *People v. Hare*, 57 Mich., 505; *Mittel v. Chicago*, 9 Ill. App., 534.

Judicial Coercion of Jury.—Language coming from the bench, obviously tending to coerce the jury into agreement, affords ground for a new trial. Any improper remark of the court in the presence and hearing of the jury, liable to influence that action is misconduct.

The jury, in *Green v. Telfair*, 11 How. Pr., N. Y., 260, after having been absent several hours in consultation, returned into court, and stated their inability to agree. The judge informed the jury that it was very important that they should agree upon a verdict; that the case had excited considerable feeling, which would be increased if they should separate without agreeing; that no one juror should control the result, or otherwise the verdict would be the verdict of one man, and not of the twelve; that both parties had taken exceptions to decisions made during the progress of

the trial, and it was necessary before these decisions could be reviewed, that there should be a verdict of some kind; that for five years he had discharged but one jury, because they were unable to agree, and that he would return Monday morning to receive their verdict. A verdict was rendered almost instantly. HARRIS, J., in reversing the lower court said: "A judge may also keep the jury together as long as in his judgment there is any reasonable prospect of their being able to agree; but beyond this I do not think he is at liberty to go. An attempt to influence the jury by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right even to allude to his own purpose as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion."

In *Slater v. Mead*, 53 How. Pr., 57, the lower court said: "You must agree upon a verdict, I cannot discharge you until you agree upon a verdict." The Court of Appeal declared that "these remarks of the justice presiding at the trial were such as would very probably induce the jury to come to an agreement, from a desire to escape longer confinement. . . . The verdict cannot be said to be the judgment of the jury, acting "without restraint, and in the discharge of their obligations, to render a true verdict

according to the evidence, and, therefore, it ought not to stand." See, also, *Phoenix Insurance Co. v. Moog*, 81 Ala., 335. The inferior court was reversed in *R. R. Co. v. Jackson*, 81 Ind., 19, for sending word by the bailiff to the jury that "if they do not agree to a verdict I will keep them there until Saturday," that was to say four days. The reversal in *Fushman v. Mayor*, 54 Ala., 263, was based on a remark by the judge to the jury that the proceeding "was a civil suit, but if the jury considered the evidence they would find it decidedly criminal." The higher court said "we cannot shut our eyes to the fact that juries . . . watch with anxiety to gather from the court some intimation as to what the judge thinks should be their finding."

Upon the jury stating their inability to find a verdict, in *State v. Ladd*, 1 La. An., 271, the judge said that the case was one of peculiar character, and that he "had reason to believe from information received that some of the jury had been approached and tampered with previous to the trial." *Held*, that such remarks had a tendency to coerce the jury into a verdict, from improper motives, and was sufficient grounds for remanding the case for a new trial.

State v. Bybee, 17 Kan., 462, is an exhaustive case. The defence was alibi. The court intimated to a divided jury that a reflection would be cast upon them if they did not agree; that there should be concession in matters of detail and minor importance; that they should bring their minds together, as an apothecary mixes different ingredients and ascertains the product, and that they need not hope to be discharged for a long time. *BROWN*,

J., in a learned opinion said "the general impression of these instructions is that the jury ought by compromise and surrender of individual convictions, of necessity to come to an agreement, and that a failure to do so would be an imputation upon both jury and court. . . . No juror should be influenced to a verdict by fear of personal disgrace or pecuniary injury. No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal considerations should never be permitted to influence his conclusions, and the thought of them should never be presented to him as a motive for action. Nor do we think the illustration given by the learned court a happy one. . . . We are constrained to believe that he passed beyond the line which should limit the counsel and instructions of a court to a jury that thereby the material rights of the defendant were prejudiced."

In *Spearman v. Wilson*, 44 Ga., 473, a judge threatened to carry a jury into another county, where he was about to hold court, if they did not agree. The Supreme Court set aside the verdict.

C. J. JACKSON, in *Physioe v. Shea*, 75 Ga., 466, said: "The new trial was properly granted (by the Superior Court) on the ground that the court erred in his remarks to the jury, in regard to allowing them their meals only at their own expense, after they had been out all night without supper or breakfast. It operated as a threat to starve such as had no money into finding a verdict, for in ten minutes, after being hung all night, they agreed

on a verdict. The old idea of starving juries to coerce a verdict has passed away." See, also, *Hancock v. Elam*, 3 Baxter (Tenn.), 33.

The circuit judge, in *R. R. Co. v. Barlow*, 86 Tenn., 537, upon the jury's report of disagreement, said, that it seemed "to be a very difficult matter for juries at the present term of the court to decide questions of fact submitted to them;" that it seemed to the court that "nearly every jury had returned and said they could not agree;" that they "ought to agree and decide cases, for they had to be decided by juries;" and that he had no idea of discharging them, but would keep them together on the case "during the entire term, if it lasted three weeks," unless they sooner agreed upon it. *Held*, reversible error.

In *Wannak v. Mayor of Macon*, 53 Ga., 163, the trial judge said: "Why, gentlemen of the jury, I saw that Christmas exhibition myself, and was alarmed, but I am not a witness in this case, and was not at the firing, and I know nothing about how the fire occurred on Cherry Street, nor intimate my opinion;" and the judge further expresses an opinion that certain testimony was "of but little value." WARREN, C. J., said the remarks of the court "were erroneous and improper." Judgment reversed.

In charging the jury in *Hair v. Little*, 28 Ala., 236, that they might give exemplary damages if the trespass was accompanied with circumstances of aggravation, the judge playfully remarked, in the way of illustration, "such damages as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others." CHALTON, C. J., said the

remark "was calculated to impress them (the jury) with the belief that the judge thought the facts such as would require them to give exemplary damages." Verdict set aside. See, also, *Moncallo v. State*, 12 Tex. Ap., 171.

Bowman v. State, 19 Neb., 523, was a peculiar case. The defendant, when arraigned for a felony, moved for a continuance, on the ground of absence of witnesses, including his father. Whereupon the judge, in the presence of certain of the regular panel of petit jurors, some of whom afterwards sat in the trial of the cause, said that the father told him that he would have nothing to do with the defendant; that the defendant had committed perjury, and that a grand jury would be called upon to investigate the same. CONN, J., said, "It may be granted that such declarations or expressions of the court did not cause the future juror to form or express an opinion as to the guilt or innocence of the accused; but it did prevent him from entering the jury box with his mind a *tabula rasa*, so far as the guilt or innocence of the prisoner was concerned, whether he was himself aware of what had been written thereon or not." Reversed and remanded.

In *Taylor v. Jones*, 2 Head (Tenn.), 365, the lower court made the following remark: "There are some cases in which I have been sometimes, in case of hung juries, almost been constrained to tell the jury that it would be better for them to find a wrong verdict than not to agree at all, as any error we may commit may be corrected by the Supreme Court."

The Supreme Court, per CARUTHEN, J., said: "The effect of such

remarks from so high a source were well calculated to mislead them as to the proper grounds and consideration upon which they should found their verdict, and settle the rights of the parties. The danger that such would be the effect, whether it was so or not, would be sufficient to vitiate the verdict. . . . Jurors should be left to the free and fair

exercise of their judgments, and not subjected to threat or coercion to induce them to surrender their honest judgments."

The reader is referred to "Misconduct of the jury as ground for a new trial," in the July number of this REVIEW.

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HITE v. HITE.¹ COURT OF APPEALS OF KENTUCKY.

*Words, Creating a Conversion of Real Property into Personal,
in a Will.*

A will authorizing the trustees thereunder to sell any of the property and directing them to invest the proceeds "so as to be safe and produce income," and pay the income to the testator's wife and children for their lives, remainder over, does not mean that the unproductive real estate of the testator shall be treated as converted as of the day of his death, so that only such portion of the purchase money would be principal as with interest from the testator's death to the day of sale, would equal the entire amount realized, and that the balance should be distributed as income, but the entire amount must be treated as principal.

EQUITABLE CONVERSION.

By equitable conversion is meant a change in the nature of property from real into personal, or from personal into real, for certain purposes of devolution, not actually taking place but presumed to exist only by construction or intentment of equity: Bispham's Equity, 5th ed., § 307.

The whole doctrine of equitable conversion depends upon the well-established and familiar principle that a court of equity looks upon

that as done which a testator by his will has directed to be done, so far as the will of the decedent could have been carried into effect without violating any rule of law or equitable principle: *Lorillard v. Carter*, 5 Paige, 173; *Emerson v. Cutler*, 14 Pick., 120.

Conversion may be effected in two ways: First, by a trust under a will; and second, by a contract between parties both living.

As a general rule, in the first

¹ 20 S. W., 778.

case, the trust must be couched in imperative language, and in the second the contract must be binding.

The conversion in the first instance takes place from the death of the testator, as that is the time when the will takes effect, and in the second instance, from the delivery of the papers forming the settlement or contract: *Van Vechten v. Van Vechten*, 8 Paige, 106; *McClure's App.*, 73 Pa., 414; *Lofis v. Glass*, 15 Ark., 680; *McWilliam's App.*, 9 Cent. Rep., 773; *Arnold v. Gilbert*, 5 Barboers S. Ct., 192.

It is only the first of these two methods of working a conversion with which we have to deal at present—that is conversion arising under a trust in a will.

By the use of certain words of direction a testator makes it imperative upon his executors or trustees to convert his estate into that species of property in which he wishes to give it to his beneficiaries. It is this duty, imposed upon the executors or trustees, which a court of equity considers as performed, even before actual conversion has been made, and in order that the rights of parties in interest may not be prejudiced by delay on the part of the executors or trustees. In carrying out the direction of the testator, the conversion directed to be made is considered as effected as of the date of the testator's death: *Craig v. Leslie*, 3 Wheat., 563; *Holland v. Cruft*, 3 Gray, 180; *Kane v. Gott*, 24 Wend., 641; *Greenland v. Waddell*, 116 N. Y., 334; *Allison v. Wilson*, 13 S. & R., 330; *Collins v. Champ's Heirs*, 15 B. Mon. (Ky.), 118; *Green v. Johnson*, 4 Bush., 167.

As a delay on the part of the executors will not prevent a conversion from taking place, so a

direction in the will postponing the time of sale will not have that effect: *Hocker v. Gentry*, 3 Metc. (Ky.), 463; *High v. Worley*, 33 Ala., 196.

There are several well-recognized ways in which conversion may be worked by a testator: First, by an express, imperative direction to executors or trustees to sell land and distribute the proceeds, or to lay out a fund in land for a devisee; second, by applying to one kind of property limitations applicable to it only in its changed form; and, third, by a blending of real and personal property in such a way that distribution can only be effected by a sale of one kind of property or the other.

The leading English authority on the subject of equitable conversion is *Fletcher v. Ashburner*, 1 Bro. C. C., 497. The testator devised real estate to trustees in trust (after his widow's death) to sell the same and divide the proceeds between his son and daughter. Nothing could be more clear and imperative than such a direction. The testator's intention, which is the touchstone by which the question of conversion or no conversion, and indeed most other questions relating to the interpretation of wills are decided, is here apparent, to wit: that the land should be sold and the proceeds divided.

The question before the court arose in this way: The son and daughter, the legatees under their father's will, both died in the lifetime of their mother, until whose death conversion in fact could not take place, and so at the time of her death the land was still in fact land, and as such it was claimed by the son's heir-at-law. The personal representatives of the widow

claimed it as personalty, and Sir THOMAS SWWELL, M. R., decided in their favor, saying: "Nothing is better established than the principle that money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted. The cases establish this rule universally."

In the old case of *Doughty v. Bull*, 2 P. Wm., 320, Lord Chancellor KING held that a direction to trustees to sell land and distribute the proceeds, the time of sale being left to the discretion of the trustees, would work a conversion. The Lord Chancellor says: "The rule being that lands devised to be sold are thereby made personal estate, this case is within such rule, the lands are here devised to be sold and only the time of sale left discretionary."

If the direction to sell be imperative a long delay in the sale will not prevent a conversion: *Yates v. Compton*, 3 P. Wm., 308, was a case of a devise of land to executors to sell and pay an annuity. There was a long delay in the sale and, the annuitant dying before it was made, the heir claimed the land. The Lord Chancellor decided that the clearly expressed intention of the will was to give away all from the heir, to turn the land in question into personal estate, and this must be taken as if it was at the time of the death of the testator, and ought not to be altered by any subsequent accident.

In 1838 Lord LANGDALE, M. R., held the following will to have worked a conversion out and out: "I do empower my wife to sell all my real estate whatsoever and the money arising from such sale,

together with my personal estate, she, my said wife, shall and may divide and proportion among my said children as she shall by will direct." The widow died without having sold or apportioned the estate. The power to sell was construed as in the nature of a trust for the children, and subject to such apportionment as the widow might make, the children were entitled in equal shares to the converted real estate: *Grieverson v. Kirsopp*, 2 Keen, 653.

The provisions in the wills considered in the cases of *in re Ibbittson*, L. R. 7 Eq., 226, *De Beauvoir v. De Beauvoir*, 3 H. L. Cas., 548, were held not to be couched in sufficiently imperative language to effect a conversion, though in the latter case the intention of the testator was to make his real and personal property blend and to give the combined fund the character of real property: See *Atwell v. Atwell*, L. R. 13 Eq., 23.

In the case of *Curling v. May*, cited 3 Atk., 255, A gave £500 to B in trust, that B should lay out the same upon a purchase of lands or put the same out on good securities, for the separate use of his daughter, H (the plaintiff's then wife), her heirs, etc., and died 1729. In 1731 H, the daughter, died without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H, and the money was decreed to the administrator; for the wife, not having signified any intention of a preference, the court would take it as it was found. If the wife had signified any intention it should have been observed, but it was not reasonable at that time to give either her heir or the administrator or the trustee liberty to elect.

Lord TALBOT said: "It was originally personal estate, and yet remained so, and by reason of the alternative language of the will nothing could be gathered from it as to what was the testator's principal intention."

Where the direction was to purchase land *or* other securities, and this was followed by the limitation to trustees in trust for the wife for life, and after her decease to such uses and under such provisions, conditions and limitations as his lands before devised were limited, Lord HARDWICK decided that conversion of the above fund was not at the election of the trustees. It was the evident intention of the testator that the money should be laid out in land, and the discretion must be taken to mean only that, till lands are purchased, the trustees might invest the money in personal securities: *Earlom v. Saunders*, Amb., 241.

Had there been no clause showing conclusively the testator's intention to convert, the alternative character of this direction would have prevented a conversion from being effected.

In *Bleight v. the Bank*, 10 Pa., 131, a conveyance to trustees to pay an annuity out of the rents of certain real estate *or* to sell was held not to make a conversion because it was not imperative on the trustees to exercise the power. Where a discretion whether to sell or not is vested in any executor or devisee conversion does not take place.

Mr. Justice THOMPSON says in *Anewalt's App.*, 42 Pa., 414: "To establish a conversion the will must direct it out and out, irrespective of *all* contingencies. The direction to convert must be positive and explicit and the will must

decisively fix upon the land the quality of money. The sale directed in this case depended upon several contingencies. It was made dependent upon the acceptance or non-acceptance of the land on certain terms by his sons. See also *Nagle's App.*, 13 Pa., 260, and *Stoner v. Zimmerman*, 22 Pa., 894.

In *Foster's App.*, 74 Pa., 391, a question as to the conversion of partnership land arose, and Judge SHARSWOOD said, delivering the opinion of the court: "Conversion is altogether a doctrine of equity. In law it has no being. It is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit equitas* has redoubled force in application to it. It follows, of necessity, that it is limited to its end. When the purpose of conversion is attained conversion ends, or, more accurately, reconversion takes place."

Where the conversion directed to be made is only for certain purposes, those purposes failing the conversion does not take place, but it is sometimes a difficult question whether the intention of the testator is to convert only for the purposes of the will or out and out for all purposes. This can only be determined by a consideration of the entire will.

In *Page's Estate*, 75 Pa., 87, the entire estate was vested in trustees, the personality to be held upon certain trusts, and the executors, in the fourth item of the will were clothed with a discretionary power to sell any part of the real estate, the proceeds of such sales to be held upon the same trust. It was held that although conversion may arise without express terms, where it is clear that the testator meant to

create a fund out of both real and personal estate, and bequeathed it as money, yet as the whole frame of the will in this case indicated no more than a mere discretionary power to sell any part of the real estate, no conversion was worked.

These words, "Lastly, it is my will, that, after the death of my beloved wife, all my estate be appraised and sold as soon as it can be done with advantage; and if any of my sons think proper to take the farm on which I now live, at the appraisement, he shall have the privilege of doing so on paying the other heirs their respective shares; and it is my will that all the money arising from the sale of my real estate be equally divided among all my children share and share alike," were held an express direction to sell, and the fact that the will further permitted one of the sons at his option to take the farm at the valuation to be made, did not change the effect of the direction to sell. Whether or not a son acquired the farm, it was nevertheless a sale, and the one taking it became a purchaser: *Laird's App.*, 85 Pa., 339.

The probable Pennsylvania rule on this doctrine is found in *Jones v. Caldwell*, 97 Pa., 42, where Mr. Justice FAXSON delivering the opinion of the court, says: "An absolute direction to sell lands after the death of the testator's widow, and to divide the proceeds among his children, effects an equitable conversion thereof into personalty." The testator in this case left the income of his real estate to his wife, so long as she remained his widow, and after her death he directed his executors to dispose of all his property real, personal and mixed, and he goes on to say that if his heirs

agree to a division of the estate amongst themselves, the executors are not to be bound to make the sale. This subsequent provision does not prevent a conversion, because it is surplusage and may be stricken from the will without altering its legal effect. The law gives the heirs the right to elect to take the property as real estate. The testator must have intended a conversion even in the event of a division of the estate among the heirs by agreement. There were eight heirs, and but five separate properties of unequal values. Be that as it may, to have divided them would have required either a sale between themselves or partition according to law. The latter would have necessarily involved an appraisement and sale, and hence a conversion.

The fact that one of several beneficiaries may be given an option to take the property in its unconverted state does not prevent a conversion from taking place: *Laird's App.*, 85 Pa., 339; *Pyle's App.*, 102 Pa., 317; *Miller v. Commonwealth*, 111 Pa., 321.

In number one hundred of the Pennsylvania State Reports are found two cases which treat the subject of conversion rather fully. The first is *Roland v. Miller*, at page 47, in which a testatrix directed that all her personal estate should be equally divided among her children and heirs at law. Further on in the will she made the same disposition of the proceeds from any sale of her real estate. The executors were not to be compelled by her heirs to sell any real estate until the expiration of the term for which such real estate might be leased. She prohibited the sale of any real estate

for ten years after her decease, unless her executors should deem it advantageous or advisable to sell the whole or any part, in which case they were authorized and empowered to do so within the term of ten years. TRUNKY, J., says: "It never is presumed that a testator intended to die intestate as to any part of his estate if a contrary intent can be fairly deduced from the language of his will. The natural and reasonable intendment of this will is, that the realty shall be sold and the proceeds divided among the legatees. Within a limited time the executors have unlimited discretionary power to sell, after that time they are bound to sell. A provision that the executors shall not be compelled to sell, by the heirs, until the expiration of a stipulated term, implies that *then* they may be compelled. The power vested in the executors, discretionary for a certain time, thereafter is unconditional, not dependent on discretion or contingency, nor upon the consent or agreement of any person, and if they neglect or refuse to exercise it, they may be compelled to perform their duty by legal process at the instance of any legatee."

The other case in this same volume of reports is Bright's App., 100 Pa., 602. Here the testator directed all his real estate to be sold for the payment of debts and legacies; some of it he directed should be sold immediately. So much of it as was not necessary for the payment of debts he directed should not be sold till the first day of April, 1866. Mr. Justice PAXSON says: "That the real estate was converted by the will is too plain for argument. Here was an express direction to sell, and divide

the proceeds among nieces and nephews. It depended upon no contingencies except time, than which there is nothing more certain."

Where land is devised to executors with a direction to sell, the legal title thereto vests in them, but by some decisive act on the part of the heirs or beneficiaries it is possible for them to divest the legal title, and take the land in lieu of money: *Anderson v. Anderson*, 133 Pa., 408.

A will containing this clause, "I give to my executors power to sell and dispose of the whole or any portion of my real estate or personal property, if they find it necessary to do so in order to make a fair and equitable division of my estate," was held not to work an equitable conversion: *Sheridan v. Sheridan*, 136 Pa., 14.

Mr. Justice WILLIAMS in the above case said: "The will gives a power of sale, but leaves the question whether it shall be exercised or not to the discretion of the executors. The reason why a power of sale works a constructive conversion is only that it makes an actual conversion certain, which is not the case where discretion to use the power or not is left to the executors. The estate is treated at once as having the qualities it must necessarily have where the power is exercised."

A testator bequeathed all his estate to his wife, for her use, as long as she remained his widow. If she desired the land to be sold, the executor was to sell it, the proceeds to be invested for her use for life, or as long as she remained his widow. Held not to work a conversion, as the direction was not positive and explicit, and the will

did not decisively fix upon the land the quality of money: *Machmer's Estate*, 140 Pa., 544.

In *Hunter v. Anderson*, 152 Pa., 385, an agreement that a trustee shall sell certain land and distribute the proceeds was considered as having worked a conversion, and the purchaser from the trustee took the land free from liens against the *cestuis que* trust and unaffected by the dower of their wives.

The case of *Fahnestock v. Fahnestock*, 152 Pa., 56, is a good illustration of an equitable conversion effected, not by an express direction to sell, but by a power of sale given to executors, and the impossibility of otherwise carrying out the clearly expressed intention of the testator in his will. Mr. Justice McCULLOM said: "It is not contended that the words, 'I hereby empower and authorize my executors to sell all my real and personal property, at private or public sale, and make and execute deeds in fee simple for my real estate,' standing alone, operate as a conversion, but it was thought by the learned judge below, and it is insisted upon by the appellees here, that these words taken in connection with the other provisions of the will, exhibit a clear intention and purpose on the part of the testator that his real and personal property shall be converted into money for investment, and the collection and disbursement of interest or income in accordance with his directions therein, and further, that it is not possible to execute the will according to its terms without such a conversion of his real estate.

A mere naked power to sell real estate does not operate as a conversion of it into personality, but such power coupled with a di-

rection or command to sell will have that effect. If a testator authorizes his executors to sell his real estate, and to execute and deliver to the purchasers deeds in fee simple of the same, as in this case, and it is clear from the face of his will that it was his intention the power so conferred by him should be exercised, it will be construed as a direction to sell, and will operate as an equitable conversion. If in addition to the clear intention of the testator, it plainly appears that effect cannot be given to material provisions of the will without the exercise of the power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executor under it are the same, as if it contained a positive direction to sell.

There can be no final settlement of the estate, in accordance with the will, until the power conferred upon the executor for the sale of the real and personal property is exercised, therefore, conversion in fact must take place, and in point of equity the estate is considered as converted from the time of the death of the testator.

In the Supreme Court of the United States *Craig v. Leslie* is the leading case, decided in 1818 and reported in 3 Wheaton, 564. The direction in the will was as follows: "I give my real and personal estate to five executors, upon special trust, that my executors will sell both my personal and real estate. I give and bequeath to my brother all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted unto him." The brother of the testator was an alien, and as such could not take land. The in-

tention of the testator was clearly to convert his real estate into personality, in order that the brother might take the bequest of the proceeds, and this intention was carried out.

WASHINGTON, J., delivering the opinion of the court, after reviewing the English authorities, says: "Were this a new question it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine that a devise of money, the proceeds of lands directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator directs by his will to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

"The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made."

In *Peter v. Beverly*, 10 Peters, 532, the testator directed certain land to be sold for the payment of debts, and did not say who was to sell. It was held, that the necessary implication was that the executors were to carry out the direction. *Craig v. Leslie* (*supra*) is quoted, and the doctrine therein stated adopted.

Taylor v. Benham, 3 How., 233, was a case in which the following clause was construed to have worked a conversion: "I do hereby order, will and direct, that, on the first day of January next, after

my decease, or as near that day as can conveniently be, the whole of the property that I may die seized or possessed of, or may be in any-wise belonging to me, be sold."

WOODBERRY, J., says: "Courts in carrying out the wishes of testators, the pole star in wills, are much inclined, especially in equity, to vest all the powers or interest in executors which are necessary to effectuate those wishes, if the language can fairly admit it. They are inclined, also, when considering it a trust, or a power coupled with an interest, to have its duration and quantity commensurate with the object to be accomplished: *Bradstreet v. Clarke*, 12 Wend., 663; *Coster v. Lorillard*, 14 Wend., 299. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted for the purposes of the will, so much of his estate, or the money arising from it, as it not effectually disposed of by the will (whether it arises from some omission or defect in the will itself, or from any subsequent accident which may prevent the devise from taking effect) results to the heir-at-law: *Burr v. Sim*, 1 Wharton, 252. See *Cropley v. Cooper*, 19 Wall., 167.

In New York the doctrine of equitable conversion has been adopted in toto, and the rules for determining whether or not conversion in a specified case is to be considered as having taken place are much the same as those applicable in the same case in an English court.

The intention of the testator, if sufficiently clearly expressed, governs in this matter; when once that intention is determined, as

well as in all other questions concerning the construction and interpretation of wills. There must be either an express, imperative direction to the executor or trustee to sell, or a power of sale given, in connection with a limitation applicable to the property only in a changed form from that in which it is at the time of the testator's death, or by a blending by the testator of his real and personal estate, making it distributable as personalty.

In the case of, *In the Matter of Gansert*, 136 N. Y., 106, there was a direction to executors to pay debts of decedent and certain legacies. This was followed by a clause in the following words: "Giving and granting unto my said executors and trustees full power and authority to sell and convey any and all my real estate, either at private sale or public auction, and to make, execute and deliver good and sufficient conveyances therefore."

MAYNARD, J., says: "The testator well knew that his debts could not be paid, as directed, without sale of real estate, and he intended to clothe his executors with a power commensurate with the duties and obligations laid upon them.

Whenever a power or authority to sell is given without limitation, and is not in terms made discretionary, and its exercise is rendered necessary by the scope of the will and its declared purposes, the authority is to be deemed imperative, and a direction to sell will be implied, provided the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt, and his intention cannot

otherwise be carried out: *Scholle v. Scholle*, 113 N. Y., 261; *Chamberlain v. Taylor*, 105 N. Y., 194; *Hobson v. Hale*, 95 N. Y., 393. The real and personal estate is blended in one gift to the executors for a common trust, in which all the beneficiaries share equally. In such cases the exercise of a general and unlimited power of sale is imperative, and may be compelled in favor of any party who is lawfully entitled under the provisions of the will to the real property when sold.

In the case of *Clift v. Moses*, 116 N. Y., 144, the following power given to an executor was held not to work a conversion as a sale was not absolutely necessary for the purposes of the will: "I give and devise to my executor and executrix all my real and property of every kind in trust for the purpose of paying my debts and legacies named in this, my last will, giving them power to sell, mortgage and convey any and all real estate for the purposes above named."

HAIGHT, J., delivering the opinion of the court, said: "Conversion arises only from an express, clear, and imperative direction, or from a necessary implication of such: 6 Am. and Eng. Encyclopedia of Law, 665. The question of conversion is one of intention, and the question is did the testator intend to have his real estate converted into personalty immediately upon his death? The whole will, and the circumstances of each case must be considered in deciding this question. If he did so intend, the court must give this intention effect, and treat the realty as personalty from the time of his death. If, however, he intended to give the executor, or trustee under his will,

a power to convert, leaving it discretionary with them to convert or not, the conversion will depend upon the will or discretion of the executor or trustee, and will not be regarded as consummated in law, until it is consummated in fact. In the will under consideration a power to sell, mortgage or convey any or all of the real estate is given. It is left entirely discretionary with the executor or trustee whether the sale shall be made or not, and as to whether the whole, or a portion only, shall be sold. It follows that there was no conversion until the executor exercised the power and consummated the sale." *Henderson v. Henderson*, 21 N. Y., 800; *Parker v. Linden*, 22 N. Y., 614.

Evidently the distinction between *Clift v. Moses*, and *In re Gansert*, is to be found in the circumstances of each estate—in *Clift v. Moses* there was sufficient personal estate to pay all debts and legacies—without a sale and, therefore, the intention to convert could not be imputed to the testator, while in *In re Gansert* there was not sufficient personal estate for the purposes of the will, and the testator, with knowledge of such fact, having directed the accomplishment of those purposes, must be considered as having at the same time directed a sale of his real estate to make up the deficiency, and thereby worked a conversion out and out.

A mere power of sale in the executor does not work a constructive change of the property. The duty to sell must be imperative: In the *Matter of the Will of Fox*, 52 N. Y., 530. But where a power of sale is given, and it is apparent from the general provisions of the will that the testator intended his real estate

to be sold, the doctrine of equitable conversion applies: *Phelps v. Bond*, 23 N. Y., 69.

In the case of *Fisher v. Banta*, 66 N. Y., 438, the will directed the executors to divide the real estate equally between the testator's two sons, and a codicil directed his executors to sell his real estate. It was held that the direction to sell was indicative of an intention on the part of the testator that his land should be divided between his two sons *as personality*. By this construction both clauses of the will were effectively carried out. Had the first direction been obeyed, and the land distributed, the second direction could not have been of any effect, for there would have been no land left to sell, and the direction would have been nugatory.

If the direction to sell is imperative, requiring a sale at all events, and leaving it discretionary with the executors only as to the time and manner of selling, the conversion will be considered as taking place at the death of the testator, and the sale when made has the same effect, in respect to the rights of the parties in interest, as though made immediately: *Arnold v. Gilbert*, 5 Barb., S. Ct., 192.

"Upon the principles of equitable conversion," said the chancellor, in *Lorillard v. Coester*, 5 Paige, 173, "money directed by the testator to be employed in the purchase of land, or land directed to be sold and turned into money is, in this court, for all the purposes of the will, considered as that species of property into which it is directed to be converted; so far as the purposes for which such conversion is directed to be made are legal, and can be carried into effect."

The same principle is also appli-

cable to the case of a direction in a will to sell one piece of land, and to convert it into another for the purposes of the will, by investing the proceeds of the sale in the purchase of such other lands, under a valid power of trust, to make such sale and reinvestment.

The general doctrine as adopted in New York is vindicated at some length in *Kane v. Gott*, 24 Wend., 641, in which a trust in the executors was created, with imperative directions to sell, as soon as may be, the testator's whole real estate, and appropriate the avails to the purposes of the will, in connection with his other personal property. By his own act the testator had the power to throw the land into this shape, either by sale before his death or by his will: *Gott v. Cook*, 7 Paige Ch., 521; *Van Vetchen v. Van Vetchen*, 8 Paige, 106; *Stagg v. Jackson*, 1 Comstock, 206.

In *White and Tudor's Leading Cases in Equity*, Vol. 1, Part 11, page 1159, it is said, "The courts of Kentucky, though they do not reject the principle, obviously regard it with disfavor," and in support of this the following cases are cited: *Clay v. Hart*, 7 Dana, 1; and *Samuel v. Samuel's Administrators*, etc., 4 B. Mon., 245.

Clay v. Hart does not support this statement, as the only point decided in that case, touching in any manner upon equitable conversion, was that where a mere direction was given to executors to exercise discretion whether to sell or not, the power could not be exercised by the survivor of the executors. As there was no devise to them of the legal title, nor of any personal interest, nor any direction to sell, no equitable conversion was considered to have been worked.

Indeed the same rule is applied in Kentucky as in England and Pennsylvania. The question is, does the testator direct a sale, and show an intention that the beneficiaries shall take as legatees and not as devisees, if so the land is converted as of the death of the testator. The Court says in this case: "Had the testator peremptorily directed the sale of the land (and not for a special purpose, that might fail, or not require the sale of the whole of it) so that none of it could in any event go to the heirs, or devisees, it would have been treated, in equity, at the instant of his death, as a portion of his personal estate, and a direct and unconditional gift. A testamentary gift to his wife and children of the produce of the sale, might have been considered as a legacy for the payment of which the executor was bound by law. The words of the will in this case formed no direction of sale, the title to the land passed, by the will, to the beneficiaries, with a discretionary power in the executor to sell the land.

Samuel v. Samuel's Administrators, etc., 4 B. Mon., 245, is the other case cited to show disapproval of the doctrine of equitable conversion, by the courts of Kentucky. True it is here said to be extremely artificial, and that it will not be applied, by the Chancellor, to change the quality of property, as the testator has left it, without a clear indication manifested to give it character as money or land.

But this is no more than is said in many other States; indeed, everywhere the direction must be imperative to sell, at all events, thereby imposing a duty on the trustee or executor in order to effect

an equitable conversion. For it is the duty to convert, and the certainty that the actual conversion will take place sooner or later, which a court of equity construes, as a conversion from the death of the testator. Here the testator devised all his estate, real, personal and mixed to three trustees, with full power and authority, in their discretion, to sell and convey any of his estate, and he directs the trustees, in finally settling up and adjusting and paying over the amount of the proceeds of his estate, to distribute among three children all such sums of money as shall belong to said estate. The direction is made discretionary in terms. Though the last clause might be construed as expressing an expectation on the part of the testator that his estate would be all converted, yet it was not sufficiently clear to infer from it a direction to the trustees to sell at all events, and thereby to work a constructive conversion.

In the opinion it is said: "It may have been described as money, in the residuary clause, not for the purpose of controlling the discretion of the trustees, nor of indicating an intention that the legatees should have nothing but money, but only because the testator may have expected, that under the discretionary power of the trustees, the estate would be converted into money. The Court goes on to say: "And will such an implied expectation, when there is no command and the distribution of the estate in kind, to those to whom it is given would not violate any express provision of the will, furnish such evidence of an intention to convert the whole estate into money, as to authorize a court of equity to regard

it as money, before it is actually converted? The doctrine of equitable conversion is at best extremely artificial. Its basis is that things agreed to be done are treated, in equity, as if actually done, but as the principle is stated in Story's Equity, Vol. II, §§ 212 and 214, they are so treated for "many purposes," and, therefore, impliedly, not for all purposes; and the court does not interfere to change the quality of the property as the testator has left it, unless there be some clear act or intention by which he has fixed upon it throughout a definite character, as money or as land. Nor will equity consider things as done in this light in favor of everybody, but only of those who have a right to pray that it might be done."

It is said in Powell on "Devises," at page 63: "The new character must be decisively and absolutely fixed upon the property." If trustees may convert it or not as they see fit, there is no constructive conversion.

I do not see that such statements show any obvious disfavor to the doctrine itself, nor can I find any expressions in *Hite v. Hite*, the case taken for annotation, which is a decision of a Kentucky court, showing that equitable conversion is any more unfavorably received in Kentucky than in the other States. Judge HOLY says, in *Hite v. Hite*: "The intention of the testator must govern." He undoubtedly intended that the trustees should so change and invest the estate to make all of it productive of income. This is evident from the eighth clause of the will which directs them to invest and dispose of it, "so as to be safe and produce income." He must have known that this could not be done at once,

without sacrifice. This doubtless led to his giving them a broad discretion in the matter. The estate was large, much of it, at his death, was already productive, and it cannot well be supposed that he expected a part of the principal would be given to the life tenants to compensate for a delay which he knew must occur before the remainder could be made so. Then follows the only clause in the opinion that could possibly be considered as throwing disfavor upon the doctrine of equitable conversion, which he had already adopted. The doctrine of equitable conversion is at best, an artificial, arbitrary one. It will not be applied unless it be made the duty of the trustees to sell. The Chief Justice concedes that the duty to sell is imposed upon the trustees in this case and holds that the discretion given, relates only to the time when it shall be done.

In *Christler v. Medis*, 6 B. Mon., 37, and in *Hocker v. Gentry*, 3 Meh. (Ky.), 473, the doctrine is stated, that if the direction to sell is imperative, the right of the legatee will, in equity, be regarded as a right to money, from the time of the testator's death, though the period of sale is remote, and conversion cannot be made until the time arrives.

The Court, in the first of the above cases, said: "Real estate is converted into personalty, immediately upon the death of the testator, only where the direction to sell is positive, without limitation and without discretion as to time, on the part of those to whom the power is delegated."

The statement that the direction of sale must be without limitation as to time cannot stand, because it

is clearly the rule in Kentucky that, though the time of sale is left to the discretion of the trustees, yet if the duty to sell *sometime* is placed upon them constructive conversion will take place.

In *Green v. Johnson*, 4 Bush., 164, decided in 1868, the Court construed the words "authorize and request" as working a conversion. Judge ROBERTSON says: "If, instead of devising the title to his three daughters, and merely requesting a sale of the land, the testator had devised it to the executors, and peremptorily ordered them to sell; it is admitted that, as to that interest, it was money bequeathed, and not land devised. Nevertheless, if the will concerning the sale must be construed as mandatory, the testator must be presumed to have intended a conversion of the land into money, as best for the testamentary beneficiaries; and his intention if clearly manifest for such conversion, made the land money to the legatees. A mere authority to sell could not have been a constructive conversion; but the super-added "request to sell was constructively mandatory, because the unqualified request" was the testator's will, and left no discretion not to sell. Authority, analogy and reason allow no escape from this conclusion. Whatever a testator expresses as his will is mandatory; and if the will is unqualified the executors have no right to refuse its fulfillment. Such "request" is synonymous with "require," or "direct," or "order." The testator seemed to think that his provident end, of the best interest and security of his daughters, would be most advantageously attained by converting certain lands into money, and for

that purpose he requested his executors to make the conversion. This, in equity, was conversion itself, and, therefore, the daughters took money instead of land.

A court that will construe "request" as synonymous with "direct," in order to hold that an equitable conversion has been effected, can hardly be said to look upon the doctrine with disfavor. See also *Collins v. Champ's Heirs*, 15 B. Mon., 118.

When land directed to be sold is devised to certain persons, they take a gift of money; but if they elect to take the land as land, the sale need not actually take place, though the beneficiaries are regarded as purchasers. So, if the testator inserts in his will a clause giving a legatee the right to elect to take the land instead of money, yet as this is giving him no greater right than the law had already given him, such a will is considered as working a conversion of the land: *Rawlings v. Landis*, 2 Bush., 158; *Perkins v. Coghlan*, 148 Mass., 30; *McFadden v. Hefsey*, 28 S. C., 317.

King v. King, 13 Rhode Island, 501 (1882), shows that the courts of Rhode Island have adopted the doctrine in its entirety. The clause of the will construed in this case was one by which the testator gave his executors a general authority and power of sale of his real estate. He says: "They may from time to time, and as often as they deem to be for the interest of said trust, sell and convey any of my real estate, and invest the proceeds. DUNFEE, C. J., asks: "What was the the testator's intention? The rule being that, in equity, the property will be treated as being already what it was intended that it should become. Did the testator intend

simply to give the executor or trustee under his will a power to convert, leaving it discretionary with them to convert or not? If so, the conversion will depend upon the will or discretion of the executors or trustees, and will not be considered as consummated in law until it is consummated in fact." In support of this statement, the Chief Justice cites several English cases and *Cook v. Cook*, 20 N. J. Eq., 375; *Answalt's App.*, 42 Pa., 414; *Chew v. Nicklin*, 45 Pa., 84. The question of the testator's intention is decided by the rule given in *Story's Equity*, Vol. II, § 214, already quoted, or as the rule is elsewhere laid down: "For the will to operate as a conversion, it must show in terms, or by necessary implication, that the testator intended the property to be converted absolutely, and at all events." The reason for this rigor of construction is, that there is not a spark of equity between the next of kin and the heir, and that therefore neither ought to lose the right which the existing character of the property gives him until it is clearly demonstrated that the testator intended to have it changed.

In New Jersey, the case of *Cook v. Cook*, 20 N. J. Eq., 375, contains the rule applicable there. Chancellor ABRAHAM L. ZABRISKIE, in construing the following words in a will: "I do authorize and empower my executors to sell and dispose of all my real estate," says: "When land is directed to be sold, absolutely and positively, without any time fixed for sale, it is considered as converted into money, from the death of the testator; but for this, the direction must be imperative. If it is optional with the executor whether to sell or not to

sell, or if it is only an authority to sell without any direction, then the land retains its character as land until it is actually sold. If the directions of the will, as to proceeds, require a sale, it is equivalent to a positive direction to sell, and the land is deemed personal property from the death of the testator. In this case the executor was not directed, nor required to sell, except so far as a sale was necessary for the purpose of paying debts and the legacies directed to be paid. As to the rest, it was a mere power which he could exercise or not at his discretion, and therefore the land must be considered as having retained its character as land until actual sale.

When land for certain purposes is required to be converted into money, and in the sale more is sold than is required for these purposes, the excess of proceeds will be con-

sidered as land: *Oberle v. Lerch*, 18 N. J. Eq., 346.

The rules, as shown by the cases above digested, seems to be adopted universally throughout the United States: See *Holland v. Cruft*, 3 Gay (Mass.), 162; *Hammond v. Putnam*, 110 Mass., 232; *Perkins v. Coghlan*, 148 Mass.; *Dodge v. Williams*, 64 Wis., 70; *Ex parte McBee*, 63 N. C., 332; *Loftus v. Glass*, 15 Ark., 680; *Pratt v. Taliaferro*, 3 Leigh (Va.), 419; *James v. Thockmorton*, 57 Cal., 368; *Ferguson v. Stuart's Ex.*, 14 Ohio, 140; *Smithers v. Hooper*, 23 Md., 271.

It is the adopted rule that conversion will be effected where, either from the will itself or from the circumstances of any particular case, the intention of the testator clearly appears to be that a sale shall be made, either at once, or at some fixed time in the future.

J. HOWARD RHOADS.

DEPARTMENT OF PROPERTY.

EDITOR-IN-CHIEF,

HON. CLEMENT B. PENROSE,

Assisted by

ALFRED ROLAND HAIG.

LENNIG'S ESTATE — FULLERTON'S APPEAL.¹ SUPREME COURT OF PENNSYLVANIA.

Charity—Perpetuity.

A charitable trust taking effect on a remote contingency in derogation of another charity, even though it involves a change of trustee, is valid. In Pennsylvania, under Act of May 9, 1889, P. L., 173, a gift to a charity is not void although it transgresses the rule against perpetuities.

¹ PER CURIAM, affirming PENROSE, J., of the Orphans' Court, Philadelphia Co., reported 154 Pa. St., 209.

GIFTS TO CHARITIES AND THE RULE AGAINST PERPETUITIES.

The proper application of the rule against perpetuities to charitable devices and bequests has given rise to some interesting litigation. It has been said that the question of remoteness may occur in connection with charitable trusts in three ways: First, where there is a gift to a charity followed by a remote gift to an individual; second, a gift to an individual followed by a remote gift to a charity; and third, a gift to a charity followed by a remote gift to another charity: Gray on Perpetuities, § 592. To which may be added a fourth class, where there is an executory devise to a charity to take effect upon a contingency possibly remote.

The first two classes have always been regarded as subject to the rule against perpetuities, and need no discussion: *Company of Pewterers v. Christ Hospital*, 1 Vern., 161; *Merritt v. Bucknam*, 77 Me., 253; *Theological Society v. Atty-Gen.*, 135 Mass., 285; *Commissioners v. De Clifford*, 1 Dr. & W., 245. But it is to be remembered that where the object of the charitable trust has ceased to exist, a clause restoring the property to the family of the testator has been held good: *Atty-Gen. v. Pyle*, 1 Atk., 435; *Walsh v. The Secretary*, 10 H. L. Ca., 367; *Randell v. Dixon*, 38 Ch. D., 213.

The third, and to a limited extent the fourth class, have been regarded as free from objection on the ground of remoteness, an exception worth consideration. To do this it is necessary to examine the purpose of the rule itself. If the object of the rule is to prevent perpetual holding, if "the ability to alienate" is the test, then no logical objection can be made to

the exception. If a perpetuity has no other meaning than "an inalienable, indestructible interest," then it is but a natural sequence that the policy of the law, which permits the creation of charitable trusts for the purpose of holding property forever, should also protect them from such rules as would defeat that policy. If, on the other hand, the rule against perpetuities is, as Mr. GRAY states, directed not to preventing the alienation of present interests, but against the creation of remote future interests, the exception loses its logical consistency, and is open to the objections that are always to be urged against purely arbitrary rules, however great their seeming utility.

It is universally conceded that Mr. GRAY has stated the rule against perpetuities correctly, and in all cases involving private interests it will be found that the courts have made the time of vesting the controlling feature. But in cases of charities unconnected with private interests the courts have set aside this view and have based their reasoning upon the theory that the rule is directed against perpetual holding, thus involving the rule in an ambiguity distressing to accurate thinkers.

The cases discussing this subject are not numerous. The first of sufficient importance to merit attention is, *The Society for the Propagation of the Gospel v. Atty-Gen.*, 3 Russ., 142. A testator, dying in 1715, directed his executors to pay the Society one thousand pounds, after the consecration of two Protestant bishops, one for the continent and one for the islands of North America, the income in the meantime to be applied for the benefit of missionaries of the So-

ciety. When in 1824 the bishops were appointed the fund was awarded to the Society with little discussion, as there were practically no conflicting claims.

The whole question, however, was raised in *Christ's Hospital v. Grainger*, 16 Sim., 83; 1 MacN. & G., 460; 1 H. & Tw., 533, properly regarded as the leading case. Property has been devised to the corporation of Reading upon charitable trusts, with a proviso that if the corporation should fail to perform its duties as trustee for one year, the property should go to the corporation of London for the benefit of Christ's Hospital. The corporation failed to perform its duties as trustee, and the question was upon the validity of the gift over. Since property held for charitable purposes is forever inalienable, the lord chancellor reasoned, the rule against perpetuities did not apply. The property was neither more nor less alienable because given from one charity to another. "Here," says Mr. GRAY, "with submission to so great an authority (Lord COTTENHAM) is the common confusion between perpetuity in the sense of inalienability and perpetuity in the sense of remoteness." And, although the decision has long stood as authoritative, he would have it examined with a view to its rejection in any jurisdiction where the matter is not closed.

English writers have not felt called upon to offer objections to the ruling: *Marsden on Perpetuities*, 295; *Tyson on Charitable Bequests*, 423; *re Conington's Will*, 8 W. R., 444. And the decision has met with approval in a recent case in the Court of Appeals: *re Tyler* (1891), 3 Ch., 252. Testator

gave a fund to trustees of the London Missionary Society, and committed the keys of his family vault in Highgate Cemetery to their charge, the same to be kept in good repair. Failing to comply with this request, the money to go to the Blue Coat School. The society, although willing to comply with wishes of the testator, objected to having the gift clogged with such a condition, contending with great justice that it would enable the testator to do indirectly that which he could not do directly, namely, to create a perpetual trust for a non-charitable object. The court, however, thought the case fell directly within the principle upon which *Christ's Hospital v. Grainger* (*supra*) was decided. And as to the suggestion that it would open the way to evasions of the law, it was thought that the decision would not go to the length of holding "that one could get out of the rule against perpetuities by making a charity a trustee." That, said the court, would be absurd. Much was said about the comparatively harmless nature of the condition attached to the bequest; but, though harmless, it was none the less for a private purpose, and renders it difficult to decide where the line is to be drawn.

Where the gift is for the establishment of a charity, subject to a condition precedent, such, for example, as a gift of land for a site, the court has not subjected such gifts to the rule against remoteness, but has laid down the general principle that all such conditions must be fulfilled within reasonable time. This applies only where the gift is immediately and entirely devoted to charity. If personal estate is once effectively

given to charity, it is taken out of the scope of the law of remoteness. But if the gift in trust for charity is itself conditional upon a future and uncertain event, it is regarded as subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent: *Synnett v. Herbert* L. R., 7 Ch., 232.

In *Chamberlayne v. Brockett*, L. R., 8 Ch., 206, there was a gift for the erection of almshouses, "when and so soon as land shall at any time be given for the purpose." The master of the rolls thought the gift void for remoteness, inasmuch as it was dependent upon an event which might not arise for an indefinite time. The lord chancellor thought that there was an immediate gift for charity. The case *in re White's Trusts* is a complete illustration of the working of the rule. Testator left a fund for the erection of almshouses when a proper site could be obtained. The gift was held good if the site were provided: 30 W. R., 837; but the trustees failing to obtain a site within reasonable time, it was held that the legacy lapsed: 33 Ch. D., 449.

The rule in *Christ's Hospital v. Grainger* has been quoted with approval in the American courts, but the question has seldom been directly raised. In the majority of instances the contest has been between the heirs-at-law and the executors, or testamentary trustees. Under such circumstances the natural inclination of a court will be in favor of sustaining the charitable intentions of the testator, and arguments which are calculated to restrict or perhaps defeat such in-

tentions, will be distrusted. To fairly test the rule, it would be necessary for the point to arise in a suit by one charity to obtain the benefit of the gift over, upon the happening of the remote contingency which is to divest the previous charitable gift.

The decision in *Christ's Hospital v. Grainger* met with approval in *Odell v. Odell*, 10 Allen, 1. Here the trust was for the accumulation of income for fifty years, and then to charity. Justice GRAY, in reviewing the authorities, made particular mention of the leading case. Seven years later the same distinguished jurist had occasion to consider this question, then before the United States Supreme Court. The will in dispute directed that in case the institutions named as beneficiaries attempted to alienate the property devised, the executors were to enter and repossess the property, and in that event the property was devised to an orphan asylum: *Jones v. Habersham*, 107 U. S., 174. The Court could not see how the next of kin could be benefited whether the devise over were void or valid, but stated that "as an estate is no more perpetual in two successive charities than in one charity, and as the rule against perpetuities does not apply to charities, it follows that if a gift is made to one charity and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good."

The statement in the opinion that "the rule against perpetuities does not apply to charities" was incautious. That it does apply

to a limited extent was recognized in *Russell v. Allen*, 107 U. S., 163, where a rule was adopted that has been widely quoted, "a gift for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may possibly not happen within a life or lives in being and twenty-one years afterwards is valid provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person." The language of the Court may have referred to those cases only where the gift is to a non-existent charity, or to a charity upon the happening of a possibly remote contingency without a previous gift. But the rule has been extended equally to those cases where the gift is from one charity over to another: *Stoors Agricultural School v. Whitney*, 54 Conn., 342.

The question then arises, what is meant by an *immediate* gift to charity from this point of view? The courts of Connecticut have been compelled to answer this question. In *Jocelyn v. Nott*, 44 Conn., 35, the gift was to trustees, directing that if any Congregational church should desire to erect a meeting-house upon the land devised, and the trustees should be satisfied that the church was able to complete the same free from debt, the trustees were to convey the land to the church. "The devise," said the Court, "is vested only in the trustees, and no interest whatever has as yet vested in the party intended to be benefited, and as such an interest may never vest, the devise tends to create a perpetuity in the trustees and vest in them property which for all

time to come may remain inalienable. This the law will not allow." On the other hand, in *Woodruff v. March*, 26 A., 246 (Conn.), testator left his residuary estate to trustees for the establishment of a school, providing certain lands and buildings in W — be given free of cost for a location of the school. The court found in other parts of the will an intention to limit this proviso to the period of twenty years; but conceding that there was no such intention, the gift to the trustees was an immediate gift to charity, and should the land not be given within a reasonable time the intended purpose of the trust might fail, but it would be by the non-performance of a condition subsequent. See also *New Haven Institute v. New Haven*, 60 Conn., 32.

In Pennsylvania, the views of the Supreme Court, as expressed in the earlier cases, were not in harmony with *Christ's Hospital v. Grainger*, but in the long interval of time that elapsed before it became necessary to pass upon the question these views underwent a change. In *Hilliard v. Miller*, the devise was to certain church corporations to lend the income from the fund to young farmers and mechanics in loans secured by mortgages, and if the income should accumulate beyond the application for loans, then to apply the income to the erection of a hospital. It was decided that the first trust was not a charity, and, therefore, an illegal accumulation, and that since the gift to the hospital was not immediate, and might not vest within the legal period, it also fell: 10 Pa. St., 326.

While this is the only early case bearing directly on the question,

the words of the Chief Justice in *Philadelphia v. Girard's Heirs* are worth noting in this connection. The facts need not be mentioned as the Court went somewhat out of its way in discussing the subject. "Suppose," it was said, "that some of the directions given for the management of the charity are conditions upon which a new charity is depending, they would, therefore, on the showing of the claimants here, be void conditions of the new charity, because they may not happen within the time allowed for the vesting of executory devises, and, therefore, could not divest the already vested charity. Their character is such as to avoid rather the substitutionary charities than the principal and vested one:" 45 Pa. St., 39. It can hardly be doubted that a court expressing such views would, if a case had then arisen, have rendered a decision adverse to *Christ's Hospital v. Grainger*.

Time has wrought a change in the views of the courts, and it is not surprising to find to-day a sentiment overwhelmingly in favor of aiding and upholding charitable bequests by the use of every rule of construction that can reasonably be turned to their advantage. In the case of *Franklin's Estate*, 150 Pa. St., 437, testator bequeathed £1000 to the city of Philadelphia in trust to let out the same to young married artificers, and at the end of terms in gross of 100 and 200 years the fund with accumulations to go to the city and State for designated charitable purposes. It was urged on behalf of the petitioners, the representatives of the residuary legatee, that *Christ's Hospital v. Grainger* was not law in Pennsylvania. Conceding that the first

gift was non-charitable and also that a contingent gift to a non-existing charity beyond the period allowed by the rule against perpetuities is void, the Orphans' Court could not see how this would favor the petitioners. "The gift, though its application for the purpose ultimately intended was deferred, was immediate, and the beneficiary was itself the trustee:" 27 W. N. C., 345.

In the Supreme Court the appeal was dismissed on a question of jurisdiction, and in consequence the matter was brought before the Common Pleas Court, 2 Pa. Dist., 435.

Passing over *Hilliard v. Miller, supra*, where a strikingly similar trust was characterized as "a loan office in the garb of a charity," the bequest for the aid of the young married artificers was held a good, charitable gift, and that on the whole Dr. Franklin's will "established in legal form three valid, benevolent and beneficial charities, neither one of which is vulnerable when assaulted upon any of the grounds which were argued before us." While admitting that *Philadelphia v. Girard's Heirs (supra)* correctly stated some of the objections to a perpetuity, the Court declared that "the greater objection is the accumulation of a large fund in individual hands, thereby creating a menace to the community." The danger arising from accumulations did not disturb the courts until long after the rule against perpetuities was settled law: *Theilsson Act*, 39 George III, c. 98. Objections on the ground of unlawful accumulation and objections on the ground of remoteness have always been treated as entirely distinct when historically considered.

So that if this opinion is literally adopted it will certainly add a new feature to the rule against remoteness.

In Lennig's Estate, 154 Pa. St., 309, the case annotated, the Court, in discussing *Christ's Hospital v. Grainger*, points out that the case is much stronger in favor of the ultimate charity where there is no change of trustees. But "whatever may be said of the soundness of the reasoning of Lord COTTENHAM, by whom the opinion was delivered, the question it would seem is no longer an open one in Pennsylvania, where the legislature has come to the relief of the judiciary by passing the Act of May 9th, 1889, P. L., 173, which in the most unequivocal terms declares that a gift for a charity shall not fail because transgressive of the rule against perpetuities." The act cited adds little to that of 1855, P. L., 331, which designed to extend the *cy pres* doctrine in Pennsylvania, *Bispham's Equity* (5th ed.) p. 197, n. 5, was not appealed to in questions of remoteness: *Roger's Estate*, 43 Leg. Int., 292. And it might naturally have been inferred that the Acts of 1885, P. L., 259, and of 1889, P. L., 173, were "merely auxiliary to and in aid of the purposes of the former acts upon the same subject." *Pepper's Estate*, 154 Pa. St., 331. The judicial interpretation of the act, however, is final: *Lewis' Estate*, 1 Dist. Rep., 148, and the rule against perpetuities practically eliminated from the law of charitable bequests in Pennsylvania. The act is as follows:

SECTION 1.—"Be it enacted, etc., That no disposition of property heretofore or hereafter made for any religious or charitable use

shall fail for want of a trustee or by reason of the objects ceasing, or depending upon the discretion of a last trustee, or in excess of the annual value limited by law; but it shall be the duty of any court having equity jurisdiction in the proper county, to supply a trustee and by its decrees carry into effect the intent of the donor or testator so far as the same can be ascertained and carried into effect consistently with law or equity subject to an appeal as in other cases, etc."

The courts of New York having rejected the common-law doctrines regarding charities, have placed the law of charitable bequests upon a basis radically different from that of England: *Bascom v. Albertson*, 34 N. Y., 384; *Holland v. Alcock*, 108 N. Y., 312. The validity of trusts, therefore, for objects which the English law describes as charitable, are in New York governed by the same rules, by which the validity of trusts for private purposes are determined. In every case the vesting must take place within two lives in being at the time of testator's death: *Cottman v. Grace*, 112 N. Y., 299. The objection is not to the perpetual holding of property, for a gift to a duly incorporated charitable institution, for the purposes of its creation, is perfectly good: *Holmes v. Mead*, 52 N. Y., 332; *In re Strickland's Estate*, 17 N. Y. Supplement, 304.

The chief difficulty has arisen in the case of a bequest to a corporation non-existent at the time of testator's death. If the will expressly provides that the corporation must be created within the period allowed for the vesting of future estates, the gift is valid: *Shipman v. Robbins*, 98 N. Y., 311; *Barrill*

v. Boardman, 43 N. Y., 254. In the latter case the testator provided for the establishment of a hospital, to be incorporated within two years after testator's death, provided two lives named in his will should continue so long. The decision in favor of the validity of this gift was regarded as "a pronounced departure from what was supposed to be the rule governing charitable bequests." *People v. Simonson*, 126 N. Y., 299, and the conditions of the law are to be strictly maintained. In *Cruikshank v. Home of the Friendless*, 113 N. Y., 337, the executors were to apply as soon as practicable to the legislature for an act incorporating the institution. The trust was held incapable of being sustained for the reason that the incorporation was dependent upon the will of the legislature, and the period of delay contingent upon the action of the State was not measured by lives: *Booth v. Baptist Church*, 126 N. Y., 215; *Tilden v. Green*, 130 N. Y., 29.

With the law so adverse to gifts for charitable purposes it seems hardly possible that the question of a gift over from one charity to another, upon a remote contingency, could be raised in New York. The point, however, has been alluded to in one of the inferior courts: *In re Williams' Estate*, 1 Misc. Rep., N. Y., 440. The bequest was to trustees, to apply the income from the fund to the payment of the salary of the pastor of a church, subject to the condition that, if ever the said church should become extinct, the trustees were to turn over the amount held in trust to the Board of Church Extension. This last gift over, the Court remarked, "was hopelessly bad, and no attempt was made on the argument to defend it."

The will construed in the case of *Judevine v. Judevine*, 61 Vt., 389, contains clauses that might have called for explanation if the question of remoteness had been raised. A trust-fund was set apart for the education of deserving young men, and at any time after five years from testator's decease the executors might in their discretion appropriate what remained to the towns of C and H for school purposes. A codicil provided, "should either town, or both, neglect to carry out the provisions set forth by me, the fund delivered and paid to such town by my executor is to be collected from such town and placed in some other town that will carry out my desires." As the court did not find it necessary to refer to this last clause, it must be presumed that no difficulty was presented to its mind in regard to the remoteness of the gift over to the unnamed towns.

Although technical objections may be urged against the ruling in *Christ's Hospital v. Grainger*, based as it is said to be upon a misconception of the purpose of the rule against perpetuities, it is far from likely that it ever will be disturbed. It is always, of course, more satisfactory when legal conclusions are drawn from clear, true, and unambiguous premises, but the precedent has been found useful and convenient for citation, to those conflicts where the charitable intentions of the testator are opposed by the claims of collaterals. If it is to be the policy of the law that charitable gifts are to be favored to the greatest possible extent, then the rule against perpetuities must yield to that policy.

WM. HENRY LOYD, JR.

EDITORIAL NOTES.

BY W. D. L.

TO THE READER.

THE third year of the present editorial management of the *AMERICAN LAW REGISTER AND REVIEW* opens with only one change in the construction of the magazine.

In the year that has passed we have maintained a department of original articles, of annotations, of book reviews, and a digest of recent decisions, together with an editorial department, and occasional notes and comments. The Department of Original Articles, devoted to treating topics of current interest from a legal point of view, will be continued as heretofore. During 1893, the Behring Sea Controversy gave us the opportunity of publishing an interesting article from the pen of one of the assistant counsel, Mr. RUSSEL DUANE. The last six months of the year we printed a series of six articles from the pen of CHARLES CHAUNCEY BINNEY, Esq., one of the assistant Attorneys General of the United States, on the new and interesting topic of Local and Special Legislation. These articles have attracted wide notice throughout the country, and form the only complete treatise on the subject. This fact has led us to induce Mr. BINNEY to embody them in book form. The volume will soon be issued, and our subscribers will be duly notified as to when and where it can be obtained.

The Annotation Department, or the department which is devoted to the publication of legal briefs, has been, as it will continue to be in 1894, the principal department of the magazine. During 1893 we have published fifty-four "*briefs*," or careful and minute discussions of recent points which have come up for judicial decision. These cover all branches of substantive and remedial law. Aside from the current interest of these briefs, it is hoped in a few years that a practicing lawyer will seldom have a case on which he will

not be able to find a brief, practically already prepared, by turning to the volumes of the **AMERICAN LAW REGISTER AND REVIEW**. These briefs are written by efficient lawyers in the active practice of their profession, and are revised by some of the ablest members of the Bench and Bar in the United States. During 1893 we reviewed at length no less than fifty-four books. Indeed, every book of value which has appeared during 1893 has been reviewed during the year, or is reviewed in the present number. A few publishers, we notice, try to send us only those books which they hope will receive a favorable treatment at our hands. To these we can say that they act wisely. The **AMERICAN LAW REGISTER AND REVIEW** is not an advertising medium in its book review department for current legal literature. When we receive a book which we do not think is a good one, we deem it our duty to the profession to tell them so. We try to treat all authors fairly and impartially, but we also try to treat our subscribers fairly, and refuse to praise a book which we believe should be condemned.

During 1893 we have devoted some four or five pages each month to an "Editorial Note," on a question of current interest—usually dealing with constitutional law or public law.

We have also published a Digest of Recent Decisions. These cases have been selected with considerable care and faithfulness, by different members of the profession, from the reports of the West Publishing Company. Though some cases of value have necessarily been omitted or overlooked, the majority of the important decisions throughout the year will be found in the back part of our numbers for 1893. Whatever intrinsic merit of this Digest may have been, however, we confess that simple syllabi of cases, however important, have not proved attractive reading. We have, therefore, decided to attempt to improve this department in 1894, by combining it with the "Editorial Department" of the magazine. Each month we will review the cases and articles of interest which have appeared during the previous month. Instead, however, of skipping here

and there, and noting now a case in equity, now a case in evidence, it is our intention to take each month the cases in one or two departments of the law, and write what we hope will prove an instructive and entertaining resumé of the principal cases which have appeared during the previous three or four months. Each month we will take up two or three departments of the law. This month, for instance, we have dealt with the recent cases on insurance, corporations, and constitutional law.

Next month we hope to be able to deal with cases on other subjects. These editorial comments will not always be written by the editors of the magazine. We have a theory that a case on insurance should only be discussed by one who is familiar with the subject; that a case in equity should only be discussed by one who is familiar with equity, and that no one can be familiar with all branches of the law.

The old editors take pleasure in stating that, as will be seen on the first page of the cover of this number, they have associated with themselves Mr. William Struthers Ellis of the Philadelphia Bar.

EDITORIAL NOTES AND COMMENTS.

A PAPER BY PROFESSOR THAYER.

CONSTITUTIONAL LAW.

WE have received from Professor THAYER, of Harvard, an interesting pamphlet on the "Origin and Scope of the American Doctrine of Constitutional Law." The paper was read by the author before the Congress of Jurisprudence and Law Reform, held in Chicago, last August. Like all of Professor THAYER's writings, this is of great value. It is, besides, because of the peculiar position taken, of exceptional interest to students of the subject. The origin of the doctrine that a court can set aside an act of the legislature which is repugnant to the constitution is pointed out in the first part of the article. This doctrine is peculiar

to America, and is the keystone of our constitutional law. It is, as Professor THAYER says, the outcome of the fact that the colonial assemblies owed their existence to charters of the crown, and were prevented from transgressing these from fear of forfeiture. When the people of the several States took the place of the crown of Great Britain, the courts, after much controversy, settled down to the position that the constitution of a State, or of the United States, was paramount law, and that acts of legislation which disregarded this law were null and void. Professor THAYER traces, in an entertaining manner, how this position was gradually assumed. His article is, in fact, a mine of information on the subject, containing a complete reference to authorities and other articles.

But the real *raison d'être* of the article is to impress upon the reader the importance of a judge observing a particular canon of interpretation when he is called upon to decide whether a specific act of legislation is constitutional. The thesis maintained by Professor THAYER is that at all times, and under all circumstances, a judge should never declare an act of legislation unconstitutional, unless the constitutionality is beyond reasonable doubt. To enforce his argument, he has collected apt sayings from judges of note and authority. In so far as the article tends to impress upon us the fact that one must not expect the courts to remedy bad legislation, the paper will receive no criticism here. One of the most prevalent, as one of the worst tendencies of our political life, is our growing disposition to look to the courts for the redress of bad or foolish legislation. But we conceive that the real object of the writer was to establish the thesis above stated. As an illustration of what he means by not setting aside an act of legislature as unconstitutional, unless there exists no reasonable doubt of its invalidity, he quotes Mr. Justice BLACKBURN, in *Cap. & Count. Bank v. Nenty*, 7 App. Cas., 741, where that justice, in deciding an appeal in libel, intimated that the question was not whether the words were libelous, but whether it was beyond reasonable doubt that they were not libelous, the trial court having so considered them. Professor THAYER says, "The ultimate question is not what is the true meaning of the constitution, but whether the legislation is sustainable or not!"

If this criterion of interpretation is sound it must be good in all cases. A judge must approach, according to Professor THAYER, all questions of constitutional law in exactly the same spirit; a spirit of desire to sustain the law when by any possibility it can be sustained. With this position we cannot agree. Suppose the question involves the power of the Federal government to do something which by no possibility will interfere with the reserved powers of the States, or the individual liberty of the citizen; suppose it is a question of whether the Federal government could erect a bank, as in the case of *McCulloch v. Maryland*. Here, it seems to us, that the attitude of the court should be that contended for by Professor THAYER.

It should be one to sustain the law if possible, but not for the reasons which he gives. The law should be sustained if possible, because it is the powers of the government which has under its control the welfare

of a nation which are under discussion, not because it is a constitution which is being interpreted. On the other hand, take an act of the Federal or State legislatures, which it is claimed tramples on the individual liberty of the citizen. Take, for instance, that pernicious piece of legislation of the State of Iowa which enabled one to accuse another *ex parte* of selling liquor, and on the strength of this *ex parte* statement obtain from a court an injunction to prevent him from selling liquor; and again on another *ex parte* statement that the injunction has been violated, without trial by jury, the person might be committed for contempt. Where, we ask, would the protection for our liberty as individuals be if in the heat of local controversy such laws can be passed and the courts advance to the consideration of their constitutionality with the sincere desire to sustain the law if it can be sustained? When questions of civil liberty are at stake, it seems to us that the right attitude of the court should be to guard with jealous care the fundamental principles of that liberty as expressed in bills of rights. As a general proposition, of course, no one will dispute Professor THAYER's statements that a judge ought to be convinced beyond reasonable doubt of the unconstitutionality of an act before he sets it aside, but the same is true of any other important decision. Before making it the judge should be convinced beyond reasonable doubt. The difference between constitutional interpretation and the interpretation of the meaning of an ordinary law is that the greater importance of the decision should make the judge more careful in his consideration of the subject. But the fact that it is a constitution which is being interpreted and an act of the legislature which is being set aside should not render the court desirous of upholding the law. Whether they desire to uphold the law or not depends as a matter of statesmanship on the subject with which it deals. However unwise, however foolish, if it is a question of the exercise of a power of government, those powers should be construed in no narrow spirit; but if, on the other hand, it is a question of the rights of individuals as it was intended they should be preserved by the constitution which have been violated, no pains, it seems to us, should be spared to protect the individual as against the legislature.

The article of Professor THAYER is timely because of the loose and careless way in which acts of State legislatures are set aside by State courts. This evil is due to the fact that the legislature actually passes many unconstitutional laws on the theory that the court is the only body competent to examine the constitutionality of a law. It seems to us that this is a great and increasing evil and calls for some very radical remedy; but that that remedy does not lie along the lines suggested by Professor THAYER, and that the introduction of the idea for which he contends would result in sustaining so many laws which trampled on individual liberty, that our condition would soon become intolerable.

CATTLE AND FENCES.

We have received the following interesting communication from Mr. ALBERT B. ROWNY, of Philadelphia:

"In the December number of the AMERICAN LAW REGISTER there

is reported, under the Digest of Important Decisions, a new view of Constitutional Law. The case to which I refer is *Smith v. Bivens*, 352. The case arose in the Circuit for the District of South Carolina.

"For many years the State required the owners of cattle to fence them in—the law was changed as to the locality in question so as to require the owners of pasture lands to fence all cattle out.

"Judge SIMONSON, who has lately been nominated for the position of Circuit Judge for the Fourth District, holds that this amounts to depriving a man of his property without 'due process of law.'

"It may be of interest to call attention to the fact that for two hundred years the State of Pennsylvania required the owners of land to so fence them as to keep cattle out, yet no one ever suspected that this law deprived the owners of their property without due process of law, and it was only as the State became thickly settled that the rule was reversed and the owners of cattle required to fence them in. In many of the western States thousands of acres are devoted to pasture to every one devoted to tillage, and to require the owners of cattle to fence them in for the benefit of the few who cultivate the soil would be to destroy what amounts in some States to their principal wealth.

"But as a question of constitutional law this decision is but another illustration of the tendency to hold that legislation which in the opinion of the judges is unjust or unwise is therefore necessarily unconstitutional."

MR. COXE'S ESSAY ON THE JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION.

Just after writing the above commentary on Professor THAYER's article, we received from the executors of the late BRINTON COXE, of Philadelphia, an essay of some 395 pages on the "Judicial Power and Unconstitutional Legislation." We understand Mr. COXE had been at work on this essay for a long time before his death. The manuscript, which has been very ably prepared by Mr. WILLIAM M. MILES, was in many places evidently nothing more than notes of what Mr. COXE would have written had he lived to complete his task. In spite, however, of the necessary shortcoming arising from the fact that death cut off the author before his work was done, nothing of equal value on the origin of the idea that a court can set aside the act of a legislature for unconstitutionality and that such exercise of power on the part of the court is the exercise of a judicial function has as yet come to our notice. The essay as a whole is cast in the form of a thesis, the text of the main proposition being that the Constitution of the United States contains, in Art. 2, §§ 3 and 6, a direction to the courts of the United States and of the States to hold the acts of the States or the United States contrary to the Constitution of the United States null and void. In other words, that the framers of the Constitution intended and clearly expressed their intention in the Constitution which they drew up, that the judicial power was to decide as a judicial question the constitutionality of the acts of Congress and State Legislatures.

That which seems to have led Mr. COXE to begin his investigation was mainly the celebrated pamphlet written by Mr. McMURTRIE shortly after the decision of the Supreme Court in *Juliaird v. Greenman*, and in defence of this case, and in reply to the historian BANCROFT'S "Plea for the Constitution." In this essay Mr. McMURTRIE had impliedly maintained the following propositions:

First, That the power to declare legislation to be unconstitutional and void has been created and lodged by inference, and by inference only, in one branch of the government, to wit: the judicial.

Second, That there is no reference whatsoever to any such powers in the text of the Constitution.

Third, That no such exercise of judicial power had ever been heard of before in any other civilized countries.

It may be said that Mr. COXE's essay is an attempted refutation of these positions.

Mr. COXE first takes up the last of Mr. McMURTRIE's assertions and examines more especially the constitutional history of France, Rome and England for the purpose of maintaining the negative. He points out that the Parliament of Paris prior to the Revolution, having the power, as is well known, to record the laws made by the king, frequently refused, and in some instances successfully refused, to sanction the king's legislation by recording his acts, thereby rendering such legislation of no effect.

Turning to Rome, he points out that the validity of the edict of the emperor went unchallenged by any judicial authority, but that at one time juriconsults or prudentes had the right to determine the question whether the other class of imperial laws, known as rescripts, had the force of general laws or were simply to be held binding in particular cases. This, as Mr. COXE admits, was not holding a legislative act void, but it was holding that a legislative act was void of vigor in all cases except one.

He also points out that the Senate of Rome, acting as a judicial body, had the power to determine whether a law proposed by the magistrate at the rogation of a magistrate and accepted by the people was generally a law enacted with the proper solemnities. The interest of these extracts from mediæval French and Roman jurisprudence is great, but it is difficult to say what is the connection between them and the main argument of the author. It is true that the framers of the Constitution might have known—many undoubtedly did know—of the Parliament of Paris and its powers and the history of its controversies with the crown. But it would be going further than most of us would care to go to assert that this information was in their minds when they discussed and enacted the Constitution of the United States.

This, however, does not apply to the quotations from the writings of VATTEN, where that learned commentator on international law, in discussing the legislative power of a State and the authority of those entrusted with it, raises the question whether their power extends as far

¹ "A Plea for the Supreme Court," by Richard C. McMurtre, Esq.

as to the fundamental laws so that they may change the constitution of the State. He maintains "that the authority of these legislators does not extend so far, and that they ought to consider the fundamental laws as sacred if the nation has not in express terms given them the power to change them." This argument of Vattel is quoted and emphasized by VARNUM, the principal counsel in the celebrated case of *Trevett v. Weeden*, in which the judges, as a result of VARNUM's argument, declared void an act of the legislature of Rhode Island, which deprived persons accused of certain offences of the right of trial by jury. That the case of *Trevett v. Weeden* influenced the framers of the constitution may be admitted.

Turning to England Mr. COXE first takes up the canon law and discusses those early cases, more especially the controversy between BECKETT and HENRY VII, over the Constitutions of Clarendon, in which the prelate successfully undertook to annul the statutes because they were *contra libertatem ecclesiasticam*. That acts contrary to ecclesiastical dignity or privilege, or contrary to the express mandates of the Pope were, practically, of no effect in England prior to the reign of Henry VIII, is, of course, undisputed. But we cannot see that the controversy between Church and State has any vital historical connection between the modern constitutional controversies between Federal and local authority. The conduct of the Roman church in the twelfth century in endeavoring to free ecclesiastical persons from the jurisdiction of civil courts may strongly resemble the decision in the case of *Tennessee v. Davis*, in 10 Otto, 257, in which the Supreme Court of the United States held a plea to an indictment for homicide in a State court good, which set out that the court had no jurisdiction, because the accused was a United States official, and the act charged was done in discharge of his duty. There may be some surface similarity in these two cases, but they have no historical connection, direct or indirect. On the whole, it would seem to us that these ecclesiastical cases do not add anything to the strength of the argument, that the power of the judiciary to set aside acts of legislation was familiar to the framers of the constitution, because history prior to the adoption of the constitution showed many examples of such judicial acts. The act of ecclesiastics in annulling the statutes which were in derogation of their independence of the common law was not a judicial act, but the act of an independent power in the body politic, which independent power was, after a long struggle, brought under the civil power of the State. The reign of HENRY VIII is the final culmination and successful issue of this struggle. The king and Parliament became supreme over all persons in England. The same criticism may be extended to the examples given by the author of the cases in England prior to the revolution of 1688, which, as the case of *Godden v. Hales*, declared that no act of Parliament could take away the power of the king to dispense with the laws, for the laws were his laws, and he was an absolute sovereign. This power of the judges to disregard an act of Parliament and to obey the king, rather than the Parliament, was finally and forever done away with by the Bill of Rights of 1688. That the framers of our constitution were familiar with these cases goes without saying, but that

a case like *Godden v. Hales* could have had any influence on their minds other than one of repulsion seems to us almost beyond dispute. The court in its controversy with the Parliament had, in the then most recent examples, invariably upheld the right of the oppressor—the kingly as opposed to the popular side. We must confess that an examination of the authorities submitted by Mr. COXE has not proved to us that the framers of the Constitution could have been by any possibility influenced in what they did, in regard to erecting the judiciary as the arbitrator of the constitutionality of legislation, by the constitutional or legal history of England.

When, however, the author turns to our own judicial history, prior to 1787, then it seems to us he has no difficulty in establishing the fact that the framers of the Constitution must have been perfectly familiar with the circumstance that the judges in several States had exercised the power of setting aside the act of the legislature as contrary to the constitution, both in cases where the constitution of a State was written, as in North Carolina, and where it was largely unwritten, as in Rhode Island. His examinations of the cases of *Rutgers v. Waddington*, from New York; of *Bayard v. Singleton*, from North Carolina, are excellent. In the discussion of the latter case he gives in full the text of Judge IREDELL's letter to RICHARD DOBBS SPAIGHT, then attending the Constitutional Convention in Philadelphia, in defence of the court's decision, a great convenience, because of the scarcity of copies of the life and correspondence of IREDELL.

The discussion of the case of *Rutgers v. Waddington* is of especial importance from the new light in which Mr. COXE views the case. In that case, as those familiar with the general subject know, the New York court held that in interpreting the statutes of the State they should follow BLACKSTONE's Tenth Rule of Construction, and refuse to regard an act as deliberately intending to repeal prior acts unless the legislature had introduced a *non obstante* clause, *i.e.*, unless they had used the expression, "all prior acts to the contrary notwithstanding." In other words, Mr. COXE points out that the court in New York took the English position that they would not construe an act as directly going contrary to the general principles of the law of the land, unless there were express words repealing the prior acts, as rules of law. He also points out that the ordinary oath of a judge on taking his office, not only involved the fact that the judge was to maintain the laws as enacted by the legislature, but the laws of the land, *i.e.*, those fundamental principles of law which had grown up with the history of English jurisprudence. The upholding of the law of the land, except where it was expressly set aside by acts of the legislature, was part of the judicial duty of the court. Therefore, when the Constitution of the United States said that the Constitution of the United States and laws made pursuant thereof should be the supreme law of the land, and the judges in every State should be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding, they used technical phrases which showed that they were addressing not only the judiciary of the United States but of the States, and laying on them an additional

judicial duty, *i. e.*, to consider not only the acts of State legislatures and the laws of the land, or of the State, but, as paramount law which could not be disregarded, the Constitution of the United States. There is a great deal of force in this argument, and it is by no means the least valuable of the many interesting and important suggestions which abound almost on every page of the essay.

That Mr. COXX intended, had he lived, to supplement this argument from the *non obstante* clause, with many others to prove that from a textual commentary of the Constitution one would arrive at the conclusion that the framers expressly intended that the judiciary should become, what they have since become, the interpreters of the Constitution, is evident. But this part of his work, as is said by Mr. MEXICA, the compiler, is so incomplete, that the exact line of his argument cannot now be made out, and any attempt to make a resumé of it would fail to do justice to what the author had in mind. Therefore, in one sense, Mr. COXX failed to disprove Mr. McMURRAIN's position that it is only by inference that we can come to the conclusion that a court has the power to declare an act of the legislature invalid. On the other hand, it may be said that he has probably put in the hands of a successor enough arguments, suggestions and material to enable such successor to accomplish the object which the author desired to attain.

There is one part of Mr. COXX's essay, and one reason for his writing it, which we have purposely left out from this review until now, because we believe it would only serve to confuse the reader, as it confused us, when we read his work. This is, his deductions from the reasoning of the Court in the last of the legal tender cases, to wit: *Jailliard v. Greenman*. The Court maintained, if we have read that case aright, that since the United States government was the government of a sovereign and independent nation, it had all the powers which a sovereign and independent government ordinarily would have had which had not been expressly taken away by the Constitution, or which was not directly repugnant to the framework of our Federal State. The limitations we have mentioned are just as important as the general statement that the Federal government has all the powers of a sovereign government in respect to finance and defence.

The author, however, seems to have read the decision in the case as intending to confer upon Congress all the powers of the British Parliament; that nothing which any foreign nation has done the United States could not do, provided it is not prohibited. Thus, it is not expressly prohibited from declaring that the courts of the United States can hold a law of the United States void, therefore an act of Congress which declares that the Supreme Court and other courts shall not declare hereafter any of its acts unconstitutional is, if the argument in the case be sound, a valid act. We think that all persons, in going over this chain of reasoning, will cry out "*non sequitur*." It does not follow that because the court in the case of *Jailliard v. Greenman* bore in mind that it was the powers of a national government that they were considering, that they will forget from henceforth that we have in the United States a Federal government and a constitution, and it certainly does not follow, as would

seem to have been Mr. COXE's position, that if you can prove that the Constitution of the United States expressly gave to the courts the power to declare an act of Congress unconstitutional, that therefore the decision in the later legal tender cases was wrong. Had the learned author lived to revise his manuscript and complete his work, we believe that more mature consideration would have led him to see that in spite of the fact that the legal tender cases and his disagreement with the decision of the court led him to undertake the work, that decision really had nothing to do with the main thought of the essay. We cannot help thinking, also, that he would have changed the form of the whole and made it, less a controversy in which he all through he maintains a certain proposition, and more distinctly what it really is, of one phase of the judicial power and its control over legislation before the adoption of the Constitution of the United States.

The executors of Mr. COXE and the able constitutional lawyer, Mr. MERRICK, have done an invaluable service to all lovers of constitutional law in publishing the results of the work of one who was at once an erudite scholar and a profound thinker."

As a final word to our readers, we should like to say that to one who is at all interested in the subject of this work, it will be invaluable. It may be incomplete, but it is none the less a mine of information and suggestion.

INJUNCTION TO KEEP MEN AT WORK.

We notice in the papers that a Western Circuit Court of the United States has issued an injunction restraining certain laborers who are the employees of a railroad in the hands of a receiver appointed by the Court, from going on what is technically termed "A Strike."

An injunction to restrain men from working is in plain terms an order on them to continue to work. This order, if it is correctly reported, goes much farther than any court has heretofore undertaken to go. The decisions of Judges TAFT and RICKS in the Ann Arbor cases, which will be found examined at length at page 481, Vol. 32 of the AMERICAN LAW REGISTER AND REVIEW, though they have a surface similarity, and are some of the steps leading up to the present decision, are in reality very different. Judge TAFT in that case decided that he could restrain by injunction, Chief ARTHUR, of the Brotherhood of Locomotive Engineers, from issuing a telegram ordering the employees of a particular railroad to refuse to handle interstate freight coming from another road. Judge RICKS decided that a man could not remain in the employ of a railroad and refuse to carry interstate freight. He had his choice of getting out or of carrying the freight. There was no attempt on the part of either judge to order an employee to perform his contract of service. There is a wide difference between ordering a man not to do an act which will interfere with interstate freight and ordering a man to continue to work for a particular employer. The fact that all the employees of the road intend to go on a strike in a body and that their act would cripple the road, does not seem to us to alter the legal aspect of the case.

The evil which may result from this extension of the equity powers

of a court is very well illustrated by a decision of Judge BREWER's, when he was on the Circuit Court for the District of Kansas.¹ A certain road was in the hands of a receiver. There was a strike on the road. Judge BREWER issued an order prohibiting the strikers from interfering with the running of trains. After the order had been issued, the officers of the road complained that A. B. and C. had violated the court's order. The court investigated the facts and put the men in prison for a contempt of the injunction. The practical effect was to deprive the accused of the right of trial by jury. We believe that all these commitments for contempt on injunctions to restrain crime are unconstitutional.

The power of a court to commit for contempt is the outcome of the necessity for some peremptory power to enforce implicit obedience to the orders of the court made in the conduct of a case. To use this power to enforce criminal statutes is a gross abuse.

Violations of such injunctions, as we have elsewhere pointed out, should be tried in the ordinary way, the only effect of the injunction being to increase the penalty because the person who commits the crime has had warning.

To return to the more recent decision. Here it seems that because the receiver is an officer of the court and the property technically in the possession of the court, all the employees of the road are to be treated as if they were members of the United State army and had surrendered their will into the hands of the Federal judiciary. The number roads in the hands of receivers makes this decision of great moment and fraught with serious consequences. Without going into an extended argument here, we would like to throw out this suggestion. If the majority of roads in this country are going to pass, through the form of receiverships, under the control of one of the departments of government, the only department under which they should not come is the judiciary. The judiciary is our only safeguard against the acts of executive officers contrary to law. But if a judge is to be turned into a manager of railroads and an executive officer, we have no safeguard. If the judge as an executive officer commit a wrong, we can only appeal to the judge, as a judge, to right the wrong. At one time it might have been said that the receiver was the government executive officer, and the judge corrected, in his judicial capacity any wrong which he did. But this is largely a pleasing fiction. A few days ago we read in the paper that the employees of a certain railroad petitioned the court to order the receiver of a road not to reduce wages any more. The receiver in the Western case obtains an injunction from a Judge to prevent his employees leaving. The court, therefore, is turned into the real executive for the property of the road and its conduct. Our contention is that the legislative and executive departments of the government are the only departments which should manage property in the hands of the government. If the government is to run the railroads of the country, and the employees of the railroad are to be directed and treated as officers and servants of the government, then it is better that we should know it at once, and place the control of the railroads in that department of government to which it belongs, to wit: An elected congress and not an appointed judiciary.

¹ U. S. v. Kane, 23 Fed. Rep., 748 (1885).

BOOKS RECEIVED.

(All legal works received before the first of the month will be reviewed in the issue of the following month. Books should be sent to Wm. Draper Lewis, Esq., 738 Drexel Building, Philadelphia, Pa.)

A TREATISE ON THE LAW OF QUASI-CONTRACTS. By WILLIAM A. KEE-
NER. New York: Baker, Voorhis & Co., 1893.

THE LAW OF CONTRACTS. By THEOPHILUS PARSONS, LL.D. Three
volumes. Eighth edition. Edited by SAMUEL WILLISTON. Boston:
Little, Brown & Co., 1893. (Reviewed in this number.)

A TREATISE ON THE NEGLIGENCE OF MUNICIPAL CORPORATIONS.
By DWIGHT ARVEN JONES. New York: Baker, Voorhis & Co.,
1892.

SUNDAY—LEGAL ASPECTS OF THE FIRST DAY OF THE WEEK. By
JAMES T. RINGGOLD. Jersey City, N. J.: Frederick D. Linn & Co.,
1891.

**MANUAL FOR INSPECTORS OF ELECTION, POLL CLERKS, BALLOT CLERKS
AND VOTERS OF THE STATE OF NEW YORK.** By F. G. JEWETT.
Albany, N. Y.: Matthew Bender, 1893.

**THE LAW OF PUBLIC HEALTH AND SAFETY, AND THE POWERS AND
DUTIES OF BOARDS OF HEALTH.** By LEROY PARKER and ROBERT
H. WORTHINGTON. Albany, N. Y.: Matthew Bender, 1892.

SYPHILIS IN THE INNOCENT (Syphilis Insontium). Clinically and
Historically Considered, with Plan for the Legal Control of the
Disease. By D. DUNCAN BULKLEY, A.M., M.D. New York:
Bailey & Fairchild, 1893.

LAWYERS' REPORTS ANNOTATED. Book XIX. All Current Cases of
General Value and Importance decided in the United States, State
and Territorial Courts, with full annotation. By BURDETT A. RICH
and HENRY P. FARNHAM (Cited 19 L. R. A.). Rochester, N. Y.:
The Lawyers' Co-operative Publishing Co., 1893.

ELEMENTS OF ECCLESIASTICAL LAW. Compiled with Reference to the
Latest Decisions of the Sacred Congregations of Cardinals. Adapted
especially to the Discipline of the Church in the United States. By
REV. S. B. SMITH, D.D. Vol. I. Ecclesiastical Persons. Ninth
Edition. New York, Cincinnati, Chicago: Benziger Brothers, 1893.

LAWYERS' REPORTS ANNOTATED. Book XX. All Current Cases of
General Value and Importance decided in the United States, State
and Territorial Courts, with full annotation, by BURDETT A. RICH,
Editor, and HENRY P. FARNHAM, Assistant Editor, aided by the
Publishers' Editorial Staff and by the Reporters and Judges of each
Court. (Cited 20 L. R. A.) Rochester, N. Y.: The Lawyers' Co-
operative Publishing Co., 1893.

A TREATISE ON TRUSTS AND MONOPOLIES, containing an Exposition of the Rule of Public Policy against Contracts and Combinations in Restraint of Trade, and a Review of Cases, Ancient and Modern. By THOMAS CARL SPILLING. Boston: Little, Brown & Co., 1893.

AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION, being a Commentary on Parts of the Constitution of the United States. By BRINTON COXK, of the Philadelphia Bar. Philadelphia: Kay & Bro., 1893. (See extended review of this work in Comments, *infra*, page 76.)

SHARP & ALLEMAN'S LAWYERS' AND BANKERS' DIRECTORY FOR 1894. January Edition. Published Semi-annually in January and July. Adapted for special use of Attorneys, Bankers, Merchants, Manufacturers and Business Men generally. Philadelphia: Sharp & Alleman, 1894.

A TREATISE ON THE WRIT OF HABEAS CORPUS, including Jurisdiction, False Imprisonment, Writ of Error, Extradition, Mandamus, Certiorari, Judgments, etc., with Practice and Forms. By WILLIAM S. CHURCH. Second edition, revised and enlarged. San Francisco: Bancroft-Whitney Co., 1893. (Reviewed in this number.)

REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE. A treatise adapted to use in all the States and Territories where that system prevails. By JOHN NORTON POMEROY, LL.D. Third edition. Edited by JOHN NORTON POMEROY, Jr., A.M. Boston: Little, Brown & Co., 1894.

GENERAL DIGEST OF THE DECISIONS OF THE PRINCIPAL COURTS IN THE UNITED STATES, ENGLAND AND CANADA. Refers to all Reports, official and unofficial. First published during the year ending September, 1883. Annual, being Vol. VIII of the series. Prepared and published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y., 1893.

TREATISE ON EXTRAORDINARY RELIEF, IN EQUITY AND AT LAW. By THOMAS CARL SPILLING. Covering Injunction, Habeas Corpus, Mandamus, Prohibition, Quo Warranto, Certiorari. Containing an exposition of the principles governing these several forms of relief, and of their practical use, with citations of all the authorities up to date. Two volumes, 8vo. Boston, Mass.: Little, Brown & Co.

AMERICAN RAILROAD AND CORPORATION REPORTS, being a Collection of the Current Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago: E. B. Myers & Co., 1893.

BOOK REVIEWS.

A TREATISE ON THE LAW OF INSURANCE, including Fire, Life, Accident, Guarantee and other Non-marine Risks. By ARTHUR BIDDLE, M.A. Two volumes. Philadelphia: Kay & Brother, 1893.

BIDDLE on Insurance is a welcome addition to the literature of this vast and undefined branch of law. There is no other satisfactory book which aims to cover all or even a considerable portion of the field. PORTER on Insurance is defective in arrangement and the author occasionally allows himself to be carried away by his "hobbies," so that his work cannot be regarded as altogether reliable. RICHARDS on Insurance, while admirable in its way, is written *in usum tyronum* and makes no claim to be considered as an exhaustive treatise upon insurance law. Other works exist but they are, in general, either special treatises upon particular kinds of insurance or they are works which have now become antiquated and have been swept away in the rapid current of modern judicial decisions.

Mr. BIDDLE's work "is an attempt to develop the principles applicable to all branches of non-marine insurance, by regarding the contract of insurance as the fundamental idea of the work, and then by proceeding to consider its structure, the essential elements in its formation, the rights that accrue to the parties to it after it is formed, the capacity to avoid it, its performance, the consequences dependent upon its breach, and the measure of damage." In pursuance of the plan thus outlined, the work is divided into six books. Book I deals with the Formation of the Contract. In this book, Chapter I deals with the Form of the Contract; Chapter II, with the Parties; Chapter III, with Mutual Assent; Chapter IV, with Insurable Interest; and Chapter V, with the Consideration or Premium. In Book II, the author discusses the Rights of the Parties in the Contract before the Contingency Insured against occurs. This book is divided into two parts—Part I deals with the Rights of the Insured, and Part II with the Rights of the Insurer. In the former part is set forth the law respecting Alienation or Diminution of the Insured's Interest, Title to the Policy, in Respect of Property, on Sale, Lease, etc.; Assignment, Cancellation and Renewal, and the Right to Receive a Paid-up Policy and Dividends. In the latter part, the author treats of Cancellation, Re-Insurance, Novation and Amalgamation. The Avoidance of the Contract forms the subject of Book III, wherein are considered Fraud, Illegality, Mistake and Failure of Consideration; while Book IV is occupied with a discussion of the Performance of the Contract. This book is divided into three parts, the first of which concerns the Duties of the Insured. The chapter headings in this part are as follows: Conditions, Warranties and Representations; Description of the Insurance Intended; Vacancy and Disuse; Title and Incumbrances; Overvaluation at the Inception of the Contract, and Agreement to take Inventories; Increase of Risk in Insurance in Respect of Property; Hazardous

Risks in Insurance in Respect of Life, and Accident to the Person; Additional Insurance; Premiums and Assessments; Duty of the Insured at a Fire; and Notice and Proof of Loss, Death, etc. Part II is concerned with the Duties of the Insurer—Adjustment, Payment and Re-Insuring. Part III treats of Estoppel and Waiver, the three chapters being devoted respectively to Preliminary Remarks, Estoppel and Waiver of the Insurer and Estoppel and Waiver of the Insured. Book V, on the Breach of the Contract is also divided into three parts, the Remedies and Defences of the Insured, Remedies and Defences of the Insurer and Remedies and Defences of Third Parties. Book VI treats of the Measure of Damage.

It is obvious that this classification is the result of much thought and careful analysis. It is in many respects absolutely original and an examination of it gives the reader an idea of the broad scope of Mr. BIDLER's work. The treatment of all the subjects is full and the two volumes together contain some 1400 pages, while the table of cases cited (printed in double columns) covers about ninety pages.

Several questions will suggest themselves to the critical reader who examines the forgoing analysis with care. He will ask himself whether it would not have been more logical to postpone a discussion of the Avoidance of the Contract (the subject-matter of Book III) until after treating of the Performance of the Contract. He will also question the propriety of treating the important subject of the Duties of the Insured in respect of Conditions, Warranties and Representations as a subdivision of Book IV, on the Performance of the Contract. It is true that in a certain sense the insured, in performing conditions, in complying with warranties and in making good representations, is performing his side of the contract; but it is submitted that, according to the method of treatment adopted by the author, these topics should be classified as Preliminaries and Inducements to the Contract—since many of the representations and warranties are (like some warranties for title) broken, if at all, as soon as made, and since the distinguishing characteristic of all of them is that they prescribe the basis upon which the parties forthwith proceed to contract.

Again, the reader may at first feel inclined to criticise Mr. BIDLER for having included in his work a discussion of many topics which are in no sense peculiar to insurance law. It may be said with some justice that a discussion of Equity Jurisprudence in relation to Fraud and Mistake and in relation to Waiver and Estoppel is out of place in such a work as this, since the principles discussed are applicable to all contracts, not merely to contracts of insurance. So, also, of the chapter on the Mutual Assent, in the course of which the author discusses the subject of Contracts by Correspondence, and the mooted questions raised by *Dunlop v. Higgins*, *Adams v. Lindsell* and *McCulloch v. Eagle Insurance Co.* To such a criticism the author would doubtless reply that in order to make his work as practical and as useful as possible he had, after deliberation, decided to include within it a discussion of all legal principles which are applicable to contracts of insurance, irrespective of whether or not the principles discussed are of wider application; and that he had deliberately discarded that view of the ideal treatise on the law of insur-

ance which would lead him to omit much of the matter which his volumes now contain. Such considerations have much force and it is natural that they should have a controlling influence with an author who is not prepared wholly to disregard the popular demand for a book which shall combine in itself the characteristic features of Monograph, Text-book and Digest.

The book is written in a style that is admirably clear. The author has evidently mastered his subject long before he began to put his work into its final form and the result is that the reader is not troubled and perplexed by the constant transition from one principle to another which constitutes so disagreeable a feature in the ordinary text-book. The author has not adopted the historical method in the treatment of his subject, that is to say, he does not approach the consideration of a given doctrine by tracing the development of it through the leading cases examined in chronological order. One of the most admirable features of his work, however, is the consistent manner in which he constantly recurs to the state of the law as it stood before the Insurance Statutes of 19 George II and 14 George III, in order properly to determine what was the effect of those Statutes. It is in this connection as much as in any other, that one is able to perceive the superiority of his method of treatment as compared with that adopted by Mr. PORTER.

Mr. BIDDLE, in the discussion of a given topic, generally states the general principles which are applicable to the subject in hand and then examines the decisions of particular cases either in the order of their importance or in some order other than the chronological. Occasionally, however, he allows himself to begin a dissertation with the statement of some particular decision which has no claim to so prominent a position. For example, Chapter II of Book IV, on "Payment and Re-Instating by the Insurer," begins with this paragraph:—"1031, An Agreement by the insurer to pay the policy money in gold coin must be complied with as it is a contract to pay a special commodity." This paragraph stands by itself and is unconnected in thought with the paragraph which immediately follows. Such instances as this are, however, rare and the work, as a rule, is remarkable for clearness and smoothness of treatment as well as for the manner in which the author has preserved the perspective of his work in subordinating the discussion of particular cases to the statement of general principles.

The book is admirably printed and presents an attractive appearance. The reviewer has observed but few typographical errors, and such as there are have been for the most part corrected in the table of *errata*. In the second edition of the work the publisher will doubtless see to it that the necessary correction is made in printing the running head line—"Warranties and Representations"—in Book IV, Chapter I. For three forms (pp. 481 to 529) the head line reads "*Warrants and Representations*."

Upon the whole, the thanks of the profession—and indeed of all persons whose business brings them face to face with the problems of insurance law—are due to Mr. BIDDLE for putting within our reach in so agreeable a form the results of wide reading, careful research and clear thought.

G. W. F.

ADDISON ON TORTS, BEING A TREATISE ON WRONGS AND THEIR REMEDIES. Seventh Edition. By HORACE SMITH, Benchers of the Inner Temple, etc., and A. PERCEVAL KEEF, M.A. London: Stevens & Sons, Limited, 1893.

A SELECTION OF CASES ON THE LAW OF TORTS. By JAMES BARR AMES and JEREMIAH SMITH, Professors of Law in Harvard University. Two volumes. Cambridge: Printed by John Wilson & Son, 1893.

By special arrangement with Stevens & Sons, Messrs. Little, Brown & Co., of Boston, are in receipt of the new revised English edition of "Addison on Torts"—a work which will doubtless receive a warm welcome on this side of the water. The edition which is thus laid before the profession in this country represents a revision of the entire work, and comprises more than four hundred new cases. The Editors state that they have omitted much obsolete matter, however, and the result is that the number of pages is substantially the same as in the former edition.

The law of torts seems to possess peculiar attractions for writers of the highest ability both in England and in this country. The literature of torts is, at the present time, of unusual richness and excellence. In England the works of POLLOCK and of CLERK and LINDSELL, as well as the work before us, are entitled to the highest commendation. In the United States COOLEY's exhaustive treatise and BIGLOW's valuable hand-book unquestionably deserve honorable mention; while BIGLOW's admirable collection of leading cases, with annotations thereto, is second in value only to the collection now before us, which represents the result of deep study and thorough research on the part of Professor AMES and Professor SMITH of the Harvard Law School. Of these two volumes, the first is the work of Professor AMES, while the second was prepared by Professor SMITH. The first volume comprises the subjects of Trespass; Dissuasion Conversation; Defamation; Malicious Prosecution; Malicious Injury to the Plaintiff by Influencing the Conduct of a Third Person; Malicious Injury to the Plaintiff by Means of a Tort to a Third Person; Malicious Use of One's Property in Order to Injure the Plaintiff; and Malicious Conspiracy. Volume II contains Cases upon Legal Cause; Whether Plaintiff's Action is Barred by his Own Wrong; Negligence in Relations not arising directly out of Contract; Contributory Negligence; Imputed Negligence; Whether Negligence of Maker or Vendor of Chattels may Make him Liable to Persons other than those Contracting with him; Duty of Care on the part of Occupiers of Land or Buildings; Extra-hazardous Occupations; Liability for Fire or Explosives; Liability of Owner or Keeper of Animals; Deceit; Merger or Suspension of Civil Remedy in Case of Felony; Whether Action Lies at Common Law for Causing Death; Private Action for Damage Caused by Public Nuisance; Immunity of Judicial Officers from Civil Actions; Joint Wrong-doers; and Distinction between Tort and Breach of Contract.

It is interesting to compare this admirable method of division with

the classification adopted by ADDISON. In ADDISON's work the grand divisions of the subject are: The Nature of Torts; The Justification of Torts; The Discharge of Torts; Of Remedies; Of Tort-feasors; Injuries to the Person; Injuries to Reputation; Injuries to Rights of Property; Injuries to Domestic Rights; Injuries to Public Rights; Duties of Public Officers; of Fraud; of Statutory Compensation; Notice of Action; and of Costs. Each of these outlines is, of course, elaborately sub-divided. Many of the differences of classification are due to the essential differences between the two works. The text-book, while keeping the history of the subject in view, aims above all things to reduce the law to a system. The case-books, on the other hand, have for their especial mission the setting forth of the historical development of the law, and in any case where alternative modes of classification suggest themselves, that one has been adopted which best illustrates the order in which the various problems have actually come before the courts. The reviewer, however, is inclined to think that the classification adopted in the American work is distinctly superior to the other in the matter of the treatment of Malicious Injuries to the Plaintiff by Influencing the Conduct of a Third Person and by Means of a Tort to a Third Person. ADDISON adopts the more familiar method of classifying the most important of the problems which arise in this branch of the law under the general head, "Injuries to Domestic Rights." The beauty of the division adopted by Professor AMES, however, becomes obvious when one examines the subdivision of this topic, which is as follows: Malicious Injury to the Plaintiff by Influencing the Conduct of a Third Person. Section I—By Inducing or Aiding a Third Person to Commit a Breach of a Legal duty to the Plaintiff: (a) The Duty of a Servant to his Master; (b) The Duty of a Wife to her Husband; (c) The Duty of a Contractor; (d) The Duty of an Individual not to Commit a Tort. Section II—By Influencing a Third Person who owes No Legal Duty to the Plaintiff; (e) By Slander of Title and Disparagement of Goods; (f) By Fraud; (c) By Force or Threats; and (d) By Maintenance. The reviewer also questions the propriety of treating as (ADDISON does) the subject of Deceit under the head of Fraud. Deceit, as the cases show, has undergone a separate and independent development, and it is not perceived that anything is to be gained by ignoring this fact, and by attempting an assimilation of the principles which underlie it to those principles applicable in miscellaneous cases of fraud.

As to the way in which the authors of these two works have fulfilled the promises contained in their respective outlines, the reviewer has nothing to say except by way of commendation. The selection of cases which Professor AMES and Professor SMITH have made is admirable, while the merits of ADDISON's work are too well known to require comment here. Both works should find a place upon the shelves of every member of the bar.

G. W. F.

COMPARATIVE ADMINISTRATIVE LAW. An Analysis of the Administrative Systems, National and Local, of the United States, England, France and Germany. Vol. I, Organization; Vol. II, Administration. By FRANK J. GOODNOW, A.M., LL.D. New York and London: G. P. Putnam's Sons, 1893.

It was with great pleasure that we received the first work in English on the important subject of Administrative Law. As a people we seem to have been heretofore so taken up with establishing popular government that we have neglected to regard, as worthy of special treatment, the question of how the officers of government should execute the laws or how the officers should be held up to their work. Mr. GOODNOW makes a very good beginning. As he says himself, in his preface, he has not attempted to treat the subject exhaustively. His intention has been to set forth in the first place the methods of administrative organization adopted in the four countries whose law is considered; namely, the United States, England, France and Germany; and to state, in the second place, the means of holding this organization up to its work, and of preventing it from encroaching on those rights which have been guaranteed to the individual by the constitution or laws.

The first volume treats of the question of the organization of the administrative departments of the central and local governments; and the second volume of the way in which the individual can obtain redress for wrongs inflicted upon him by the administrative officer.

The whole forms an excellent introduction to a more particular study of the subjects treated. As is the intention of the author, at no point is the discussion full and exhaustive. and, therefore, the interest which the work will excite in the minds of the readers will depend largely upon his previous acquaintance with the particular subject under discussion. For instance, where the author treats of mandamus, what is said is very good, but it is necessarily too cursory to be of interest or of value to the lawyer. On the other hand, few lawyers will fail to be interested and benefited by the short and concise account of the administrative courts of France and Germany. It is not that the discussion is any more full in the one case than in the other, but that in treating of administration in continental countries, he treats of something which is entirely new to ninety-nine hundredths of the members of our bar. In the same way the local administrative government of Germany and France is intensely interesting, while most lawyers will skip the account of the office of President of the United States.

It must be remembered that we are reviewing the book simply from the standpoint of a lawyer, and not from that of the general reading public. To the lawyer the book as a whole would be more interesting if the author had confined himself to administration in the foreign continental countries, that is, France and Germany. This, however, would have marred its usefulness in colleges, into which it will doubtless be largely introduced; both because it is the only English work on Comparative Administrative Law, and as an excellent introduction to the more minute study of the subjects treated.

W. D. L.

A TREATISE ON THE WRIT OF HABEAS CORPUS, WITH PRACTICE AND FORMS. By WILLIAM S. CHURCH. San Francisco: Bancroft-Whitney Co., 1893.

As far as the writer knows the only other work exclusively devoted to this subject is Judge HURD's *Treatise*, the last edition of which appeared in 1876. Mr. CHURCH's book was first published in 1884. Since that date considerable change has been effected in the law of the writ of habeas corpus, particularly in the Federal Courts, by the passage of the Appellate Courts Act of March 3, 1891, which fact, together with the large number of recently decided cases on the subject, render a fresh appearance of the work particularly acceptable.

Two new chapters have been added; one on the "Nature of the Writ," the other on "Appellate Practice." The former, which begins with an elaborate definition of the writ, serves as an excellent introduction to the succeeding chapters, embracing almost the entire general treatment of the subject, with the exception of the historical side. The chapter on "Appellate Practice" is a useful if not necessary addition to the work, treating fully of the nature of an appeal in habeas corpus cases, as well as summarizing the instances under which the appeal can be taken.

By no means the least interesting and important feature of the treatise is the writ historically considered. The author admirably traces his subject from the Roman interdict "*De libero homine exhibendo*" through *Magna Charta* to the famous statute of Charles II. To this subject he devotes a chapter. Continuing, he gives us the general history of the writ in the colonies and subsequently in the United States, and adds a separate chapter containing the more important Federal statutes.

The work concludes with a convenient collection of the various forms used in the habeas corpus proceedings from the petition to the return, as well as miscellaneous forms.

The author's style is much to be admired. It is clear and exceptionally intelligible even to the lay mind, and for that reason none the less valuable to the professional man. The discussions are liberally and aptly illustrated, and plentifully supplied with references and notes. The notes on the chapter devoted to the evidence are especially of value.

We wish we could say as much for the physical structure of the work as its literary character unquestionably deserves.

A thousand pages are too many to be crowded into one volume, especially in the case of a text-book, which, more than any other book, a lawyer finds occasion to take home with him. Besides, the lack of durability of very thick books is familiar to all lawyers. The work should have been divided into two volumes. The printing, too, is thin, and at times indistinct, although the headings, with which the sections are distinguished, are clear enough. A list of more than 3000 cases is appended.

W. S. E.

LECTURES IN SANITARY LAW. By A. WYNTER BLYTH. London and New York: MacMillan and Co., 1893.

This work contains twelve lectures on Sanitary Law delivered by the author at the College of State Medicine, England, as a part of the usual course of instruction in Sanitary Law and Science; and while not directly applicable to the condition of things existing in this country, it is interesting and valuable to all cultivating this branch of jurisprudence. To members of State legislatures and to aldermen and health officers in our cities, it would be invaluable, could they be persuaded to read it, as embodying the experience of an old and enlightened State and affording valuable suggestions for legislation in this country.

MARSHALL D. EWELL,
The Kent Law School of Chicago.

THE LAW OF CONTRACTS. By THEOPHILUS PARSONS, LL.D. Eighth edition. Edited by SAMUEL WILLISTON. 3 vols. Boston: Little, Brown & Co.

Professor PARSONS' already valuable work is rendered additionally valuable by the copious accurate and clear notes added to this edition by Mr. Williston, of Harvard. It is singularly appropriate that the work of the man who did so much to establish the reputation of the Harvard Law School should be edited by a member of the present faculty of that School. Mr. Williston has left the text practically untouched, save for certain slight omissions rendered necessary by recent changes and developments of the law of contracts; he has also retained the greater part of the author's original notes, omitting only certain extracts from the opinions in various cases which have ceased to be of authority; he has, however, discarded the notes of all previous editors with the exception of a few by Mr. Keller, editor of the seventh edition, to which, in every instance, his initial is attached. The author's notes are printed in parallel columns while the notes of the editor extend across the page, so that it is at once apparent to whose authority each note owes its weight. While Mr. Williston's notes are throughout clear, accurate and learned, they are especially full in the first part of the work, that devoted to consideration of the obligation assumed by the parties—the notes upon Agency, Bills and Notes and Consideration being more especially copious, valuable and scholarly. He has carefully avoided the common temptation of annotators to indulge in controversial writing, and while in every case where the text is ambiguous, or through a change in the law has become misleading, the doubt is cleared away or the error corrected, the notes remain notes upon the original work and not a series of controversial essays. The modern cases have been exhaustively examined and their effect clearly stated. In short, the whole work shows care, learning and respect and reverence for the author's work, and is a very useful and able exposition of the result of modern cases upon the subject matter.

F. H. B.

RAILWAY INJURIES, WITH SPECIAL REFERENCE TO THOSE OF THE BACK AND NERVOUS SYSTEM IN THEIR MEDICO-LEGAL AND CLINICAL ASPECTS. By HERBERT W. PAGE, M.A. (Reprinted from Wood's Medical and Surgical Monographs.) New York: William Wood & Co., 1892.

The above-named work is one well known to both the legal and medical professions and its merits are such as to need no commendation at our hands. To one investigating a case simply of "railway spine" it is indispensable.

MARSHALL D. EWELL,
The Kent Law School of Chicago.

THE AMERICAN DIGEST (Annual, 1893). Prepared and edited by the Editorial Staff of the National Reporter System. St. Paul, Minnesota: West Publishing Co., 1893.

The Digest of the West Publishing Company is too well known by the profession, and its great usefulness has been too often illustrated to the thousands of lawyers who possess it to need any commendation from us. The volume before us, containing more than three thousand pages, is what it pretends to be, a complete digest of all the decisions of the United States Supreme Court, all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories and the Intermediate Courts of New York State, Pennsylvania, Ohio, Illinois, Indiana, Missouri and Colorado, besides the United States Court of Claims and the Supreme Court of the District of Columbia. The arrangement, the system of cross-reference, etc., is excellent. Nothing seems to have been omitted which could aid the rapid finding of cases. One cannot but admire the organization and system which in the short space of six weeks edited and printed such an enormous tome. There is only one thing which the possessor of a series of these annuals will need as time goes on, and this want will undoubtedly be supplied by the enterprising company which has done so much for the profession. Many of the cases are reported in the National Reporter System long before they appear in the official reports. As a necessity, therefore, the reference to the official reports is frequently omitted, because the case is not yet reported. In a few years, however, one looking over the Digest will need a supplement containing the official citations of those cases reported in previous numbers of the Annual, and to which no official citation is attached.

To us this Digest is invaluable. It has the great merit—the greatest, perhaps, which any book can have—of doing well what it starts out to do.

W. D. L.

THE LAW OF WILLS. By JOHN B. CASSODAY, LL.D. Being a series of lectures on the subject of "Wills" delivered before the College of Law in the University of Wisconsin. St. Paul, Minn.: West Publishing Co., 1893.

This book, as the explanation accompanying its title indicates, is an elementary work more particularly for the use of students at law. It is not an ambitious work, and does not rank with the larger text-books upon the same subject, but as a ground-plan for future development in the same line it is admirable.

It is conveniently divided into seven chapters, three of them, or one-third of the volume, being devoted to the execution of wills—certainly an over-goodly portion. Numerous cases to date are cited, and plenty of space given to them, and the paragraphs and annotations are arranged in such a plain and machine-like manner as to make the work an easy reference manual when the reader is utilizing time.

To the student it is a zealous aid in making the way clear, and to the lawyer a compact collection of recent authorities.

A. D. L.

THE PRINCIPLES OF EQUITY. A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY. By GEO. TUCKER BISHAM, Professor of Equity Jurisprudence in the University of Pennsylvania. Fifth edition. Philadelphia: Kay & Brother, 1893.

The changes in equity jurisprudence that are taking place from day to day are strikingly brought to mind by this new edition of Professor BISHAM's excellent text-book. The fourth edition is but six years old when a fifth is required, with about fifteen hundred new cases and important revisions in the text. The principal changes, in the author's own words, are made in the chapters that treat of Precatory Trusts, Charities, Gifts Causa Mortis, Mistake of Law, Deceit and Mandatory Injunctions.

That the author intends his work to keep pace with the productive and creative faculty of equity jurisprudence is shown by the fact that he has not hesitated to discard some familiar illustrative cases from the text and to replace them by newer decisions which are better exponents of the changes which have taken place in recent years.

Any lengthened criticism of a work so well known, one in fact which has taken its place as a standard text-book in the country, would be idle. It will be sufficient to say that in this edition we recognize the author's well-known reserve and caution in the treatment of the cases which seem to indorse a departure from old standards; and the new matter, of which there is considerable, is stated with that clearness and simplicity which is, indeed, the chief charm of his style. We might add that this work on equity fills a unique position among text-books, for the practicing attorney as well as the student can read it with both pleasure and profit.

THE INFRINGEMENT OF PATENTS FOR INVENTIONS, NOT INCLUDING DESIGNS. By THOS. B. HALL, of the Cleveland Bar. Cincinnati: Robert Clarke & Co., 1893. 275 pages.

This work is practically a digest of all reported Supreme Court decisions relating to patents for inventions, to the end of October Term, 1892, of the Supreme Court. There has never been a complete digest of these decisions in a single volume, and the work will therefore commend itself very favorably to the patent practitioner. The sections of the various heads are in effect, if not in fact, a reproduction or reprint of the syllabi of the reported cases, and the reference to the page and volume where reported is contained in a foot note on each page. The foot note references are reproduced at the end of the book as a table of cases in addition to a table of contents and index of the subject matters of the decisions. A valuable feature of the table of cases at the end of the book is the classification of them under the various heads and subdivisions as stated in the table of contents. The matter is divided and classified under four general heads, License, Identity of Invention, Validity of Patent and Damages. The volume presents a digest of the Supreme Court cases in the most convenient form in which they have ever been issued, and will be a valuable addition to the working library of every patent lawyer, lightening his labors by the ease and facility with which, by its aid, he may make citations of authorities on any particular question relating to patents for inventions.

HECTOR T. FENTON.

BANK COLLECTIONS. By ALBERT S. BOLLER. New York: Homans' Publishing Company, 1893.

While the title of the above work fully indicates its character and importance, it may be better to indicate by a few headings of chapters and paragraphs the whole scope of the treatise upon this practical business portion of the mercantile law. The first two chapters treat of the ownership of paper endorsed either specially or in blank and deposited for collection, and it is only just to compliment the author as to this part of his work upon the methodical weeding out of the manifold and embarrassing cases upon these points—cases not so important in themselves, and only valuable to the ordinary hunter after precedents of similar facts and circumstances. In fact, Mr. BOLLER has accomplished the delicate task of clearly stating the principles of the law without clogging the book with useless citations of well-established decisions—the *impediments* of so many so-called legal treatises.

Chapter III, without possessing the fault of being a mere digest, contains a very comprehensive account of the law and mode of making collections and the attendant details; and Chapter VI is especially timely in its discussion of the law upon the reception of deposits by a bank when in an insolvent condition. In Chapter VIII, which treats of mistake and forgery, the author has presented an important list of cases

to date and stated the facts of each in a succinct manner, carefully sifting the valuable decisions from those which are of small importance.

The whole book shows good work upon the subject matter treated of and will be of valuable service to the working lawyer as well as to the thinking banker in the lines laid down therein.

We could wish that Mr. BOLLERS' work had been presented in a more correct and attractive form from the point of view of typography, but there is no doubt but that the treatise will be a handy and serviceable addition to the library of the practitioner in the more active litigation with which it deals.

A. D. L.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

FEBRUARY, 1894.

THE NATURAL USE OF LAND.

BY JOHN MARSHALL GIST, Esq.

PART II.

We now resume the consideration of *Rylands v. Fletcher* with which the last paper closed.

In this case the defendant built a reservoir upon his premises in order to obtain a supply of water for his mill. In the course of the construction of the reservoir five old shafts running vertically downward were discovered. Three at least were timbered, and all were filled with soil such as surrounded them. The arbitrator who found the facts, reported that neither the defendants nor any of their employes knew or suspected that these shafts had originally been made for the purpose of mining the coal under the land on which they built their reservoir. It may be noted in passing, that it seems rather strange that the use once made of these shafts should not have been even suspected in a place like Lancashire, as they do not ordinarily dig deep holes in the ground and tire sides for no purpose save to fill them up again. How the case as stated, finds that the defendants, *personally*, knowledge or suspicion of the purpose for which the had been sunk; and further, what is certainly more re-

that they did not know of, or suspect the connection between these shafts and a series of underground workings long since abandoned, which finally led into the plaintiff's colliery.

The reservoir itself was properly constructed by competent engineers and contractors, but it seems to be admitted (see opinion of Bramwell, B., 3 H. & C. 791, and Lord Cairns, L. R. 3 H. L. 338,) that they did not exercise, so far as they were concerned, reasonable care and caution in taking notice of the old shafts on the reservoir site. When the reservoir had been finished it was partially filled with water, but in a week's time one of the shafts in the bottom gave way and the water flowed out of the reservoir into the shafts and through the underground coal-working to the plaintiff's colliery which was flooded and consequently abandoned.

It being admitted that the defendant was personally entirely free from fault, the ordinary rule of law would be that the defendant owed no duty to the plaintiff beyond that of reasonable care, which would be a question for the jury; but the decision went upon the ground that a man dealing with a dangerous thing like a reservoir should be held to a stricter rule; that of insuring safety to his neighbor and thus the Court substituted an absolute duty instead of a fluctuating standard of prudence.

The Court of Exchequer Chamber, per Blackburn, J., gave judgment for the plaintiff on the following ground: "We think that the true rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and if he does not do so is, *prima facie*, answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the defendant's fault; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here it is unnecessary to inquire what excuse would be sufficient."

The duty of insuring safety is a heavy burden and bears hardly on the innocent. It is, therefore, not surprising that *Fletcher v. Rylands* has not been uniformly followed in

America, and even in England numerous exceptions have been made by the Courts. Thus, in *Nichols v. Marsland*, L. R. 10 Ex. 255, 2 Ex. D. 1, an extraordinarily violent rain storm broke down the defendant's embankment or dam and the resulting damage was held to be the act of God. And in *Carstairs v. Taylor*, L. R. 6 Ex. 217, a rat gnawed a hole in a water tank and the water damaged the plaintiff's goods. Kelly, C. B., said the accident was due to *vis major*.

Now, it may readily be said that the act of the defendant in Sanderson's case comes precisely within the terms of the rule in *Rylands v. Fletcher*. The water in Rylands' reservoir flowed there naturally; it was not "brought" there but merely allowed to accumulate. See 3 H. & C. 786, where the statement is made in argument. So little importance is attached to this fact that neither the reporters' statement or the judges' opinions mention it. So the coal company certainly did bring or accumulate on their land a thing, to wit: Acid and polluted mine water, which was likely to do mischief if it escaped, and, therefore, in the language of the rule, was at his peril, bound to keep the mischievous thing in bounds. Indeed, as the judgment of the Court said, that is so, whether the mischievous things were beasts, or water, or filth, or stench. And the illustration of the damage done by the filth in a neighbor's cess-pool, which poisons the water of a well, is very close to the case of the pollution of a water course by means of mine water.

Nevertheless, it would seem that the illustration used in the judgment of the Court assimilated too closely the case at bar to the case of an ordinary nuisance. Pollution of air or water is a nuisance and (so far as occurs to the writer) nothing else, and a nuisance is something well known to the law and governed by familiar rules. The damage in *Rylands v. Fletcher* was certainly not a nuisance and the rule laid down in it could not have been intended as a general rule for cases of nuisance, except so far as to indicate that the defendant, on account of the hazardous nature of his operations on his land, undertook and would be held to the obligation of an insurer, just as he who commits a nuisance is bound to indemnify his

neighbor against the consequences, it being no answer in either case to say that due diligence has been observed.

The duty enforced in *Rylands v. Fletcher* is a duty, not only to guard against doing damage through the exercise of *due* care and diligence, but, in certain cases, absolutely to prevent it by using *sufficient* care. But under what circumstances is this duty imposed? Almost anything which a man can bring on his land or accumulate there will do mischief if it escapes. If it be said that the rule is only intended to apply to cases where the thing brought on the land is of such a character that there is danger of its breaking loose and danger of its doing harm if it does so; then the question would seem to be rather a question of the degree of care or diligence to be employed in preventing its escape, and thus to be determined by the negligence of the defendant. Perhaps, it can only be said that where the act of the defendant is manifestly likely to cause damage, a stricter rule is expedient and the defendant will not be allowed to say he used reasonable care or due diligence; where, from the nature of the case, to quote the language of Pollock on Torts, the judgment of fact is consolidated into an unbending rule of law.

Now the difficulty which exists in each case when the question of negligence is submitted to a jury is certainly not less than in formulating such a principle. It amounts merely to saying that while negligence is the absence of care according to the circumstances, the omission or commission of an act which a prudent and reasonable man would or would not do: yet that the Court has the right to say on a given state of facts, that no prudent or reasonable man would have acted in such a way. Or, as a court cannot send a case to a jury on evidence disclosing to the judicial mind no proof of negligence; so a jury will not be allowed to find the defendant guiltless of negligence which the judicial mind thinks was proved.

The rule laid down by Blackburn, J., according to which the liability of the defendant grows out of his having or keeping a dangerous thing on his land, does not appear to have been entirely satisfactory to the Lord Chancellor (Cairns), for, although he quotes with apparent approval the judgment of

Blackburn, J., he substitutes an entirely different rule of his own, in which the criterion of liability is said to be the natural or non-natural user of his land by the defendant. Perhaps the Lord Chancellor noticed and attempted to amplify a passage in Blackburn, J.'s judgment, in which he speaks of the defendant "having brought something on his own property which was not naturally there," but the idea of natural *use of the land* is avowedly the Lord Chancellor's own. Indeed, it might almost seem as if he regarded the case as involving only a special rule respecting adjacent land owners, (see *Carstairs v. Taylor*, L. R. 6 Ex. 223, where one of the judges distinguished the case on that ground) but the other opinions in *Rylands v. Fletcher* certainly are of far wider scope.

The rule founded on the natural user of the land was thus explained by the Lord Chancellor (L. R. 3 H. L. 330): "The defendants might lawfully have used their close for any purpose for which it might, in the ordinary course of the employment of land be used, and, *if in what I might term the natural user of that land* there had been any accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that the result had taken place." And, again, "If the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which *I may term a non-natural use*, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities, or in a manner not the result of any operations on or under the land, and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so the water came to escape and to pass off into the close of the plaintiff, then that which the defendants were doing they were doing at their peril."

This expression, "the natural user of the land," thus appears to be original with Lord Cairns. It was quoted with approval by Lord Blackburn in *Wilson v. Waddell*, L. R. 2 App. 95, and Brett and Cotton, L. JJ., in *Iron Co. v. Kenyon*, L. R.

11 Ch. Div. 783, and applied to mining, which was said to be a natural use or user of land.

Fletcher v. Rylands, being understood, or misunderstood, to establish the rule that, where the owner of land goes beyond its "natural user," or makes a "non-natural use" of it, he acts at his peril, and is liable for the resulting damage caused to his neighbor without regard to any question of his negligence, the Supreme Court of Pennsylvania, as was pointed out by the author of a very thoughtful note to Robb v. Carnegie, 31 A. L. R. N. S. p. 38, has gone, in Sanderson's case, to the full extent of holding that the converse of this rule applies, viz: that wherever the owner of land makes a "natural use" of his land, he is not, in the absence of negligence or malicious intent, liable for the damage which necessarily result therefrom.

The Supreme Court of Pennsylvania found as little difficulty in holding that mining was the "natural use" of mining land, as the English Court found in holding that a reservoir was non-natural. Not only was the coal naturally in place, and mining a "natural" use of the land (113 Pa. pp. 145-146), but the impurities of the water were not "artificial," but "natural" (pp. 145 and 155) and the discharge of the water was by way of "natural" channels (p. 147), from the drifts, out of which the water, by the mere force of gravity, "naturally" flowed. It could not well be said that the pump by which the shaft was kept free, was a "natural instrument," or the ditch from the mouth of the shaft to the brook; but it was evident to the Court that these agents were necessary to enable the "natural" force of gravity to act, and the owner to make the "natural" use of his land.

Said the Court, 113 Pa. 148: "As the water cannot be discharged by gravity alone, it must *necessarily*, as part of the process of mining, be lifted to the surface by artificial means, and thence be discharged through the ordinary natural channels for the draining of the country." The chain of "natural" causes being confessedly broken and other agents "necessarily" employed, why does not the language of Judge Black apply that the necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both:

24 l'a. p. 298. The use of the pump is really the gist of the case.

With great deference to the opinions of the learned judges quoted, the writer is constrained to say that "the natural user of land" is to him an attractive but ambiguous form of words. It means everything or nothing. In one sense, every (lawful) use an owner makes of his land is natural; in another, no use can be natural which confessedly alters the condition of things established by nature. Natural, in one sense, is merely expedient or proper, or in accordance with what we term *human* nature, as where you speak of mining being a natural use of land, simply meaning that it is natural for the owner to get what he can out of it. Natural, in the other sense, is merely according to the laws of nature. If mining the coal as the end in view, be "natural," so blasting, pumping and draining, as the necessary means, may with equal justice be said to be natural also; but this employs the word in the first sense. The force of gravity, which makes the polluted water flow downwards is "natural" in the second sense.

Again, if a mine owner is allowed to develop his mines because he is making a "natural" use of his land, although that use "naturally" results in polluting the stream which the inferior owners use for agricultural and domestic purposes, what becomes of the "natural use" of his land by the agriculturist? It would be hard to find any more ancient, better recognized or "natural" use of land than that of pasturing cattle. Why is the miner's natural use of land to be preferred to the agriculturist's? And why is not the latter entitled to insist on his natural use as well as the other? But the decision in *Rylands v. Fletcher* really did not rest on any such criterion; it merely concerned the liability of one who brought (or suffered to accumulate) a manifestly dangerous thing within his control, and the Court held that such a one, when the dangerous thing escapes and does harm, must, as a matter of law, answer for the damage.

It may be remarked, moreover, that the decision was illustrated by the cases which hold, that the owner of cattle is bound at his peril to keep them from trespassing, and if they

escape and do damage, the owner cannot show, by way of defence, that he did all he reasonably could to keep them at home. (Blackburn, J., in the Exchequer Chamber, L. R. 1 Ex. 279.) Yet the keeping and pasturing of domestic cattle is most certainly a natural use of land; and this illustration is, from Lord Cairns' point of view, most unhappy. Again, in *Rylands v. Fletcher*, the defendant built his reservoir in order to avail himself of the water power for use in his mill: whether it be called a reservoir or a mill dam, does not seem to be important. It is a little hard to see why the owner of a "mill site," who constructs a dam to make the water power available, is not making as natural use of his land as the mine owner who bores a hole in it to get coal. For these reasons, it would seem that Lord Cairns was led to the phrase "natural user," in view of the fact, that in the case before him, the land owner brought on his land something which was not naturally there, and did not intend that the *kind of use* had any necessary connection with liability. Indeed, Lord Cairns' expressly quotes the opinion of Justice Blackburn, and approved the illustration he used as to escaping cattle, and Lord Cranworth followed Justice Blackburn's opinion as correctly stating the law.

With the correctness of the ruling in *Rylands v. Fletcher*, we are not now specially concerned. The decision at all events appears perfectly just on its facts, the difficulty (and it is a serious difficulty) is to bring the case within a general rule which shall at once be neither too narrow nor too broad. The following is submitted as an attempt only, and is probably no great improvement over the language of Blackburn, J.

He who voluntarily brings or suffers to remain under his control anything likely to do mischief, if it escape, must keep it under control at his peril. Thus stated, the rule has nothing to do with land or the method of its user. The defendant's liability would be the same whether he kept the dangerous thing on his land or in his pocket. If a man handles a gun he must not let it go off; if he makes a plaything of a snake, he must hold it fast; if he accumulates an enormous mass of water, he must keep it in bounds. The ordinary actions of

mankind are not fraught with danger to his fellows, and he is only bound to conduct himself with the ordinary prudence of a reasonable man: his extraordinary acts are subject to an extraordinary rule, mere prudence is not enough; if he might have in any possible way, prevented the evil, he is bound to do so and is liable for the consequences if he does not do so. The act of God, for which no one is responsible, is an expression which originated at a time when men had very different ideas than at this present. We mean by it, *vis major*, an unavoidable, overpowering force, rendering control impossible.

Our present purpose is merely to show that the case did not rule Sanderson's case at all; and, secondly, that the language of Lord Cairns as to natural user of land enabled the Supreme Court of Pennsylvania, not only to distinguish Fletcher v. Rylands, but also to adopt as law the converse of Lord Cairns' dictum, and say that no one, in the course of the natural user of his land, is liable for damages caused thereby.

In Robb v. Carnegie, 145 Pa. 324 (1891), the question of the natural use of land was considered. The plaintiff was a farmer, the defendant a neighbor, who erected coke ovens on his adjacent land. In an action of trespass on the case it was proved that the smoke and exhalations from the ovens killed the vegetation. The defendant urged, amongst other things, that he was engaged in a lawful business, had selected a judicious location for it and operated it without negligence or malice in a secluded place, where as few people were inconvenienced as possible, and consequently the injury was the natural and necessary result of the development by the owner of the resources of his land, as in Sanderson's case. A heavy verdict was given for the plaintiff and the Supreme Court reversed on the question of damages; while, on the merits, the court distinguished Sanderson's case as having no application. "The coal company," said Justice Williams, speaking of Sanderson's case, "was using its own land in the only manner practicable to it. The harm done thereby to others was the least in amount consistent with the natural and lawful use of its own. If this use was to be denied to the coal company, because some injury or inconvenience to others was unavoid-

able, then the result would be practical confiscation of the coal lands for the benefit of householders living on lower ground. But the defendants " (in *Robb v. Carnegie*), "are not developing the minerals in their land or cultivating its surface. They have erected coke ovens upon it and are engaged in the manufacture of coke. Their selection of this site, rather than some other, is due to its location and to their convenience, and has no relation to the character of the soil, or to the presence or absence of underlying minerals." And the question was left open "whether one who mines coal or petroleum or lead on his own land, has, by virtue of that fact alone, a right to manufacture or refine such product on the tract from which it was obtained under circumstances, which would prevent its manufacture or render him liable in damages, if he manufactured on some other tract."

Yet it would seem that a fair application of the principles of Sanderson's case would result in an affirmative answer to this question. It is quite as "natural" to burn the coal and convert it into coke as to mine it; and as natural to pollute a neighbor's farm with the fumes of gas as to pollute his stream with the acid water.

Perhaps it would have been better for the Supreme Court in Sanderson's case to have adopted Justice Paxson's suggestion in his dissenting opinion, when the case first came before the Court that the rule of the English cases as to riparian rights was not adapted to the mining regions of Pennsylvania. Indeed, the case was interpreted by the lower Court in *Collins v. Chartier's Valley Gas Co.*, 131 Pa. p. 151-2, from this standpoint: "In the Sanderson case the property of the coal company could not be used without fouling the water; the great public interests and the private rights of mining could not be sacrificed to preserve the inferior right and interest of the lower proprietor. The reason for the general rule failed, and the rule was not followed."

In the very recent case of *Hauck v. Pipe Line Co., Limited*, 153 Pa. p. 366 (1893), the defendant transported oil in their pipe. The oil escaped from their pipes, percolated through the ground and found its way into the plaintiff's

springs and land, destroyed the fish and caused heavy damage. The Court held, in an action for damages, that the question was not one depending upon the negligence of the defendant, but merely one of nuisance. The defendant argued that Sanderson's case applied, but the Court held that it did not, because the oil was brought from a distance, and the injury was not, in any sense, occasioned by the "natural and necessary development of the land" owned by the defendant; and the distinction was carefully drawn between a damage resulting on one hand from such "natural and necessary development," and on the other hand from "the character of some business not incident and necessary to the land or the minerals or other substances lying within it."

In the *Union Water Co. v. Enterprise Oil Co.*, 38 Pitts. Leg. Journal, 159 (1890), the Common Pleas of Beaver county applied *Sanderson v. Coal Company* to the case of an oil company, which, in pumping its oil well, brought to the surface a large quantity of salt water mingled with the oil. The salt water sinking to the bottom of the receiving tank by reason of its greater gravity was allowed to flow away, finally seeking its level in a stream, the water of which was rendered unfit for its ordinary use. The Court, following Sanderson's case, refused an injunction prayed for against the oil company.

The writer believes that, in Sanderson's case, substantial justice was reached in the decision. Whether the reasons are sound is another question, and it is frequently easier to reach a right conclusion than to give the right reason for it.

By way of suggestion, it may be submitted: First, the Supreme Court should have permitted it to be shown that the custom of the mining regions established an exception to the ordinary rule of law. There were many cases cited on the argument to this effect, some of which are to be found in 113 Pa. 141. A few others are: *Morton v. Solambo County*, 26 Cal. 527; *Stone v. Bumpus*, 46 Cal. 218; *Magor v. Chadwick*, 11 A. & E. 571; *Snow v. Parsons*, 28 Vt. 459, and *Prentice v. Geiger*, 74 N. Y. 341.

Custom is the life of law. It is founded on what the mass of the people instinctively recognize as just and what they

know to be advantageous on the whole to their own interests. If fairly proved, why may not the universal custom of the mining regions or the oil regions establish the law for those places, however, different that may be from the rules adapted to a purely agricultural country? The torrid climate of India requires the storing up of large quantities of water for use in dry seasons, so when the reservoir of the Zemindar of Carvatenagarum burst and injured the railway line, Fletcher v. Rylands was held not to apply, and one of the reasons given was because the reservoir was a public necessity maintained in accordance with the universal custom of the country: 1. R. 1 Ind. Ap. 364.

It is, perhaps, worth while—though this review has already taken more space than at first intended—to reproduce on this point the argument made before the Supreme Court based upon the cases mentioned.

In *Carlyon v. Lovering*, 1 H. & N. 784, above cited, a custom to discharge into a stream the waste product of the mines in the Stannaries was sustained. The Court said: "We do not see that this has a tendency to destroy the plaintiff's land or exclude the plaintiff from the use of the land, except to a partial extent. We think that the custom alleged is sufficiently definite and is not unreasonable. It is possible more stuff from the mine may come down at one time than at another, but that does not show that the custom is bad. We think that it is to be confined in use to the *necessary* working of the mine."

In *Rogers v. Brenton*, 10 Q. B. 26, the Court recognized the validity of a custom to take up tin mines in the following language: "The mine is parcel of the soil, the ownership is in the owner of the soil, but it is a parcel which to discover and bring to the surface may ordinarily require capital, skill, enterprise and combination, which, while in the bowels of the earth, is wholly useless to the owner as well as to the public, and the bringing of which into the market is eminently for the benefit of the public. If, therefore, the owner of the soil cannot, or will not, do this for himself, he shall not be allowed to lock it up from the public, and, therefore, in such case . . .

any tinner, that is, any man employing himself in tin mining, may secure to himself the right to dig the mines under the land, rendering a certain portion of the produce to the owner of the soil." And the Court, though styling this custom "a strong invasion of the rights of ownership," said: "There can be no doubt that it is most reasonable, fulfilling every requisite of a good custom."

In California precisely similar reasoning has been adopted. In that State the public interests depended upon the development of the gold mines, which constituted a large portion of the natural resources of the country. The courts there have always recognized the fact that the mining customs, which originated from the exigencies of the case, were valid as prescribing the rules of mining in particular localities. They were necessary, because in no other way could mining be carried on successfully. They were proper and reasonable, because established by those who were most competent to decide the question. Any one who discovered a lode or vein of ore located it by posting a notice on his claim. That gave him a title against everybody else. In minor points every locality had its particular usage, and these were always sustained. In *Morton v. Salambo Co.*, 26 Cal. 527, it was held that where any local mining customs exist, controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten. In another case the local custom of the diggings required every man to work his claim two days in every ten, from May to November. Failure to do so worked a forfeiture of the claim: *Packer v. Heaton*, 9 Cal. 568; *Strang v. Ryan*, 46 Cal. 33; *St. John v. Kidd*, 26 Cal. 264. So, in Colorado, in the early settlement of the territory the location of mining claims was regulated by the local usages and customs of the district: *Sullivan v. Hense*, 2 Col. 424. These mining customs acquire validity from the acquiescence, of the people: *Harvey v. Ryan*, 42 Cal. 626. The miner's right comes from the mere appropriation of the claim, made in accordance with the mining rules

and customs of the vicinage: *Gore v. McBrayer*, 18 Cal. 582; *Colman v. Clements*, 23 Cal. 245. The law is the same in Nevada: *Orcamuno v. Uncle Sam Co.*, 1 Nev. 215; *Mallett v. Uncle Sam*, 1 Nev. 188.

This question has also been considered in the Supreme Court of the United States. Mr. Justice Field, in *Atchison v. Peterson*, 20 Wall, 507, stated the law very clearly on page 510: "By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of water in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters." "As respects the use of water for mining purposes, the doctrines of the common law,^o declaratory of the rights of riparian owners, were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection." After stating the custom in the Pacific States as to appropriation of the streams for mining purposes, Mr. Justice Field says: "So the miners on the public lands throughout the Pacific States and Territories, by their customs, usages and regulations, everywhere recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories: *Irwin v. Phillips*, 5 Cal. 140."

In *Snow v. Parsons*, 28 Vt. 459, the reasonableness of the use of a stream by the upper riparian owner was held to be a question of fact, to determine which testimony, showing the uniform usage of the country, was admissible. The offer in that case was to show that it had been the universal and uniform custom and practice to discharge the spent bark of tanneries into the streams on which they were situated ever since the country was first settled, and that dam owners situated below on the streams had never, so far as witnesses knew, disputed the right to do so until now; that tanneries could not be conducted at any profit without that means of

disposing of their spent bark, and that the withholding such use of the stream from tanners would have excluded that branch of industry from the State; and that the same custom and practice had uniformly prevailed in all the States of New England. It was admitted by defendant that, prior to 1844, there was no tannery on this particular stream and this suit was brought about ten years afterwards. Judge Redfield said, the question "must be determined upon general principles applicable to the entire business of tanning, and the importance of discharging its waste materials in this mode and the probable inconvenience of those below. . . . It seems to me the uniform custom of the country for generations would be of some significance in determining its reasonableness. A uniform general custom upon this subject ought, upon general principles, to have a controlling force."

An analogous custom in booming logs is considered in *Saunders v. Clark*, 106 Mass. 331.

And in *Stone v. Bumpus*, 46 Cal. 218, a local custom was allowed to be shown by which the owner of a mining claim, comprising the bed of a cañon, was allowed to erect a dam across the bed of the cañon to enable him to work the same, even if other mining claims on the same cañon of subsequent location became thereby flooded.

Custom, in this sense, is merely the tacit recognition of the general advantage or necessity of certain things usually done, and which the common sense of the neighborhood recognizes as proper and right. It is probably some such thought which underlies the expression "the natural user of the land," because whatever is usual and customary; that which "everybody does" becomes, in a sense, natural. Plowing is not a "natural" use of land in that the natural character of the land is destroyed, but it is natural in that everybody knows that if agriculture is to be carried on at all, that is the way to do. Yet the plowing of land and the cutting down of trees to permit plowing to be done may, and often does, result in serious changes in the character of the streams. The Zemindar's reservoir was "natural" in India because authorized by custom, and, as was said "the only possible mode of natural use."

But in England the conditions of life were so different that Rylands' reservoir was merely an unusual structure threatening extraordinary danger.

In the second place, it was urged with some confidence, before the Supreme Court, that Sanderson's case involved at most a question of nuisance and was to be governed by the rules applicable to that branch of the law. The language of Lord Cransworth was quoted from *St. Helen's Smelting Company v. Tipping*, 11 H. L. 642: "I well remember trying a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved uncontestedly that smoke did come and, in some degree, interfere with a certain person, but I said: 'You must not look at it with a view to the question whether abstractedly that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields.'"

And so, in Pennsylvania, the above language was quoted with approval in *Rhodes v. Dunbar*, 57 Pa. 287; and again in *Huckenstine's Appeal*, 70 Pa. 102. In the latter case the Court said: "The properties of the plaintiff and defendant lie adjoining each other on the hillside overlooking the city, whose every-day cloud of smoke from thousands of chimneys and stacks hangs like a pall over it, obscuring it from sight. This single word describes the characteristics of this city; its kind of fuel; its business the habits of its people and the industries, which give it prosperity and wealth. The people who live in such a city or within its sphere of influence do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts for the greater benefit they think they derive from their residence or their business there."

If, then, a nuisance is a question, not only of the thing done, but of the place where and circumstances under which it is done; if persons in a populous manufacturing town have to put up with poisonous vapors, why should not persons in Scranton have to make the best of it when the surface streams are polluted by the drainage from mines, from the like of which the whole neighborhood has derived its wealth and prosperity?

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HOLLIS v. BROWN.¹ SUPREME COURT OF PENNSYLVANIA.*Lease—Warranty as to Condition of House.*

Where one leases a house and lot of ground for a term of years, there is no implied warranty on the part of the lessor, that the house is habitable, and fit to dwell in, even though the situation of the house is such that it could not be used for anything else than a dwelling house; and an affidavit of defence to an action for rent, which makes only this defence, is insufficient.

IMPLIED WARRANTIES IN A LEASE. HABITABLE CONDITION.
DWELLING HOUSE.

The above case finally settles the law in Pennsylvania on the question involved, if, indeed, it had not been practically settled by previous decisions, see *infra*. Habitable condition is not implied in the lease of a dwelling house. A. may rent a house from B. for five years, and the day after find it uninhabitable by reason of its faulty construction, yet A. has to pay the rent for the term. The rule *caveat emptor* applies. There is no escape, because there is no implied warranty that the house was habitable. This is in accordance with the previous trend of decisions in the State: See *Wheeler v. Crawford*, 86 Pa. 327. The opinion of Judge WOODWARD, in *Cannon v. Godley*, 26 Pa. 117; *Moore v. Weber*, 71 Pa. 429, page 432; *Barns v.*

Wilson, 1 Crum. (Pa.) 303; *Hazlett v. Powell*, 6 Casey, 297. As we shall see, is in accordance with the general drift of authority in the United States. It is not, however, on the exact point involved, as the law of England. We will first trace the English authorities on the subject.

As long ago as 1811, Lord MANSFIELD decided the case of *Baker v. Holtzpfaffell*, 4 Taunt. 44. This was an action for rent. The premises in question had been let for one year. Shortly after the first quarter's rent had been paid, the house was burnt down. It was held that the tenant had to pay the rent for the remainder of the term. The ground, on which Lord MANSFIELD put the decision, was one peculiar to the common law. The civil law

¹ 157 Pa.

would have looked at the lease as a contract. Doing so, the question would be necessarily decided in favor of the tenant. He had leased a particular thing, *i. e.*, a house, and the house, the subject matter of the contract, had disappeared. The contract was necessarily terminated. But Lord MANSFIELD advanced at the question from the standpoint of the English law of real property. What was rented was not the house but the land. "The land," he says, "is still in existence, and there was no offer on the part of the defendant to deliver it up. The landlord could not enter to rebuild." While Judge HEATH adds, on this last point, "the defendant might have rebuilt at any period of the term, whereas the landlord would have been a trespasser, if he entered for that purpose." This was good logic from the point of view taken, but the absurdity of telling the tenant, who was liable to be turned out within a twelfth month, that because he could build a new house for the benefit of his landlord and, therefore, must pay rent, is evident. It is said by Justice HEATH that the case had often been decided before *at nisi prius*, though this is the first reported decision. The defendant evidently knew his case was hopeless, for he had appealed for relief to Lord ELDON (*Holtzaffell v. Baker*, 18 Ves. 116). But unlike the life tenant in possession, the leasee is not a favorite with the Chancellor, so the bill was dismissed.

The law of this country, unlike the English law, except where altered by statute as in Ohio and Illinois, has followed this leading case.

After all, there is something to

be said for the common law rule. The burning of the house is the fault of neither party to the contract. It is as fair that it should fall on the tenant as on the landlord. Had equity interfered, it might have divided the loss, requiring the tenant to pay half the rent.

As we have said, the decision in this first English case is undoubtedly still law on the point involved both in England and America. Where, however, the premises become uninhabitable, through a defect existing at the time of the lease, the English decisions cannot be made to agree with the reasoning of Lord MANSFIELD or with the Pennsylvania case.

In 1825, the case of *Edwards v. Etherington, Ky. & Moody*, 11, 268, came up for decision. It appeared that the walls of the house, for rent of which the action was brought, were in a dilapidated condition. The defendant, who had occupied the house as tenant from year to year, finding that the house was unsafe, left it. The landlord did not accept a release for some time. The question involved was whether the landlord could demand rent from the time the defendant had quitted the premises to the date when he had finally agreed to accept them from the tenant. Lord Chief Justice ANNOTT charged the jury that it was for them to say whether such serious reasons for quitting existed in the case, as would exempt the defendant from the demand on the ground of his having no *beneficial use and occupation* of the premises; and that, through no fault of his own, but through the fault of the plaintiff, who ought to have taken care that the premises should

have been in such a state as to continue useful to the defendant, the house became unfit for use. The verdict was for the defendant.

From the first of the report of this case, there is no way in which it can be reconciled with the principle enunciated in *Baker v. Holtzapfell*. Lord Chief Justice ANNOTT seems to advance towards the question from an entirely different standpoint than that taken by Lord MANSFIELD. He looks at the lease as he would at a contract for goods and chattels, and asks whether there has been any *beneficial* use and enjoyment by the tenant. In his mind, the beneficial use and enjoyment was the essence of the contract. In Lord MANSFIELD's mind, the question seems to have been simple whether the tenant had been given control of a certain portion of the earth's surface, the fact that the lease really contemplated the occupation of a house being left out of consideration.

The next case, that of *Collins v. Barrow* (1831), 1 M. & R. 112, departs, if anything, still farther from the case of *Baker v. Holtzapfell*. There the defendant took the house, the rent of which was in question, under a written agreement by which he was to occupy for three years and to keep the premises in a tenantable condition. He had, in fact, quitted the premises without notice at the expiration of the first six months. The defendant said that the house was unfit for habitation for want of sufficient drainage, whereby it became unwholesome, noisome and offensive. Baron BAILEY, in his decision remarked: "I do not see that the fact of the tenancy in this case, being under a written agree-

ment, is material. In any case, the tenant is bound to pay rent during the time for which he has contracted, unless he satisfies the jury that, under the circumstances, he was justified in quitting. I think, however, that in point of law he will be freed from his obligation to reside on the premises, if he makes out, to the satisfaction of the jury, that the premises were noxious and unwholesome to reside in, and that this state arose from no default or neglect of his own, but from something over which he had no control, except at an extravagant and unreasonable expense." The house in this case was practically uninhabitable until a sewer was built, and the court held that the tenant was not bound to build a sewer, and if the landlord did not build it, the tenant could move out and terminate the lease. In the subsequent case of *Ardlen v. Pullen*, 10 M. & W. 321, it is intimated that the report of the case of *Collins v. Barrow* is not complete, and that it is possible there existed an express stipulation on the part of the landlord that he would build a sewer. From the whole opinion, however, of Baron BAILEY, it is evident that this express stipulation was not necessary for his decision. He took the point of view, which had been taken by Lord Chief Justice ANNOTT, and which was the point of view of the civil and not of the common law. Had the rest of the English judges advanced at the question from the same standpoint, they would have soon expressly overruled the earlier decision in *Tannton*, but Lord ABINGER, in the later case of *Ardlen v. Pullen*, 10 M. & W. 321, returned to the common law rule.

The declaration in that case stated that on the 25th of March, 1839, by an agreement made between the plaintiff and defendant, the plaintiff agreed to let, and the defendant agreed to take of the plaintiff, for the term of three years, from the 25th of December, 1839, a house and premises at the yearly rent of thirty pounds, payable quarterly, and the defendant, among other things, agreed with the plaintiff that he, the defendant, would keep the said premises in as good repair and condition as the same then were, and would so leave the same on the termination of the said lease, fair wear and tear excepted. The breach set out was that the defendant had not paid the two quarters' rent, which became due on the 25th of March, 1842. The excuse of the defendants in their plea was that the said house and premises, by means and in consequence of age and natural decay, and the badness of the material thereof, and the bad and improper manner, in which they were originally built, and the rotten foundations, and the unsafe state and condition of the walls, timbers and foundations thereof, and for want of good and sufficient sewerage and drainage, etc., that the premises were in a ruinous, bad, and unsafe and dangerous condition and wholly unfit and unsafe for habitation, and that the defendant had requested the plaintiff to put the house in good condition, and he refused. Counsel for the defence argued that the case of *Collins v. Barrow* was in point, as it undoubtedly was. Lord ABINGER, however, took the position that, unless there was some fraud or improper concealment on the part of

the plaintiff, the contract for letting the house was perfectly good, and implied no warranty that the premises were in a good condition; that the landlord, under the lease, had only one obligation to perform, to wit: not to disturb the quiet possession of the tenant during the term. The allegation in the plea, he asserted, would not be good, had it not contained the assertion that the defects in the house arose through the fault of the plaintiff. As this allegation could not be proved by the defendant, the real question was, whether, when a house turns out to be uninhabitable, the landlord is bound to repair it. "I think," says Lord ABINGER, "that without some express stipulations he is under no such obligation."

Baron ALDERSON was of the same view in his opinion, he cites the case of *Iron v. Gorton*, 5 Bing. N. C. 301 (1839). The case follows *Baker v. Holtzmaffell*, the circumstances presenting exactly the same question, the premises for the rent of which the suit was brought having been consumed by fire. The peculiar circumstances of this last suit, however, bring out very forcibly the absurdity of the English reason, for the Lord MANSFIELD had decided the case before him on the ground that the landlord could not enter to repair without being a trespasser, and that the only person who had a power to repair was the tenant. In *Iron v. Gorton* the tenant occupied two upper stories in a house. The landlord actually did enter and repair. A man who rents so many square feet of airspace fifty feet in the air, enclosed by four walls of a room, is obliged to pay rent for the space when the house is consumed by fire, and a

balloon is the only method by which he can reach his peculiar portion of the atmosphere, and this all because Lord MANSFIELD refused to look at the lease as a contract for the use of a particular thing, which it really was, and insisted upon regarding it as creating a temporary estate or interest in a portion of the surface of the earth.

In justice to our courts, however, it is fair to say that with us where the leased premises consist of a room in the building, and the building is entirely destroyed by fire or otherwise, the tenant is discharged from his obligation to pay rent: *Stockwell v. Hunter*, 11 Met. (Mass.) 448; *Graves v. Berdan*, 26 N. Y. 498; *Pollock on Contracts*, 363 *et seq.*

Other English cases following *Arden v. Pullen* are *Gott v. Gandy*, 2 E. & B. 845; *Keates v. Earl Carloman*, 10 C. B. 591.

The English Courts, which seem to be abandoning the position of Lord MANSFIELD in 1825 and 1830, return to it again in 1839 and 1840. In 1843, however, the same Lord ABBINGER, who had decided the case of *Arden v. Pullen* in 1842, entirely abandoned his position in his decision in the celebrated case of *Smith v. Marrable*, 11 M. & W. 5. (But see *Hart v. Windsor*, 12 M. & W. 68.) This case, on which the peculiar English law on this subject is largely based, was an action for rent brought to recover a balance of five weeks rent of a furnished house at Brighton, which had been rented by the defendant of plaintiff under the following conditions: "Mr. John Smith, of 24 St. James Street, agrees to let, and Sir Thomas MARRABLE agrees to take, the house No. 3 Brunswick

Place, at the rent of eight guineas per week, for five or six weeks, at the option of the said Thomas MARRABLE." Under this agreement, the defendant and his family entered into possession of the house. On the following day, Lady MARRABLE complained to the plaintiff that the house was infested with bugs, and he sent a person in to take means for getting rid of them. This means, however, did not prove successful, and at the end of the first week Lady MARRABLE removed from the premises and returned the key to the plaintiff. There was no stipulation in the contract that the house should be habitable. The fact that it was a furnished house was evidence that it was to be used as a dwelling house. Baron PARKE cites, with approval, the cases of *Edward v. Etherington* and *Collins v. Barrow*, while Lord ABBINGER, who had distinctly overruled those cases in *Arden v. Pullen*, asserts here that he is "glad that authorities have been found to support the view which I took at the trial," and even adds that, for his own part, no authorities are wanted, as its common sense alone enables him to decide. The inconsistency of these two opinions was such that it soon became necessary for the learned judge to attempt to draw some distinction between them. This he did in the case of *Sutton v. Temple*, 12 M. & W. 52 (1843). In this case the rent of a meadow was in question. The plaintiff refused to pay the rent, because the meadow turned out to be unfit for the pasturage of cattle. It is not clear, from the report of the case, whether the tenant could have used the premises in any other way than as a pasturage. In his decision, in

favor of the plaintiff, Lord ABBOT says: "If this case involved the necessity of overruling the case of *Smith v. Marrable*, I should hesitate long before I should acquiesce in so doing so, for I entirely approve of the decision which we came to in that case." He then sets out the ground of distinction. The first case is the letting of a house and furniture. Being for both house and furniture, it must be meant for occupation. The furniture must be fit for use, *i. e.*, so must the house. But he assumes that the tenant in the case before him could only use the land as a pasturage. He admits that the land could not be used for pasturage, but it is not the landlord's fault, he has no knowledge that his field is in a bad condition and will poison cattle which are put upon it. Therefore, he cannot be held responsible. For our own part, we cannot follow this logic. It seems to us that there is no evidence that the plaintiff in *Smith v. Marrable* knew that his premises were infested with bugs or that they were so infested from any fault of his. Why then should that case rest on a different principle than that of *Sutton v. Temple*? Where is the real distinction?

Following the trend of the decision in *Sutton v. Temple*, BACON, B. C., in *Powell v. Chester*, 52 L. T. Rep. 722, said that the principle of the decision in *Smith v. Marrable* should be confined to where a person rents a house for a month or two at the seashore. In that limitation, however, there is no reason.

We believe that the English courts will sooner or later overrule one case or the other and adopt a consistent principle. The case of *Wilson v. Hutton*, 2 L. R. (Ex

Div.) 336 (1877), would seem to indicate that there would ultimately be embodied in the English law of the obligations of the tenant under a lease to pay rent the principles of the civil law. This last case, as the case of *Smith v. Marrable*, was the rent of a furnished house. When the tenant moved in she found that the drains were in such a condition that the house was not reasonably fit for habitation. KELLY, C. B., said, in his opinion, permitting the defence, "we have allowed some argument to be addressed to us by counsel for the defendant, not because we entertained any real doubt upon the question raised in this case, but because of the general importance of the points involved, and because of the comments which had been made at various times on the law as laid down in the case of *Smith v. Marrable*." The attitude of the learned judge is totally different from that taken by Lord MANSFIELD in 1811. To his mind the contract is for a house, and not, as with Lord MANSFIELD for a piece of land which may happen to have a house on it. All through the opinion, we see the question of what the parties to the lease intended rather than how should we decide the case as a technical question of real property. The only case cited, as a case in point, is that of *Tully v. Howling*, 2 Q. B. D. 182, which was a case of admiralty law on an agreement to charter a ship. The other judges who decided the case advance at the question from the same standpoint. That this standpoint reaches results which are entirely irreconcilable with the American law and the position of Lord MANSFIELD in *Baker v. Holtzapffel* will soon

become apparent to the English Bench. To hold a man liable to pay rent if the house burns down, but to discharge him from the obligation if it happens to be infested with bugs, is absurd. The American law which holds a tenant liable under all circumstances, except where there has been fraud or misrepresentation on the part of the landlord, has at least the advantage of being perfectly clear and logically consistent. The position of the American courts has also this practical advantage, in spite of its apparent unfairness to the tenant, and the absurdity of its conclusion when we look at the real intention of the parties to the lease of a house. So many tenants, who have not inserted the fire clause in their lease, have been obliged to pay rent for a burnt ruin, that the law on the subject is well known throughout the States. Being well known, the parties put what they really intend in black and white, and in doing so, tend to lessen litigation. If every time, for instance, that a tenant thought his house was uninhabitable, he could move out and leave it to a jury to say whether his action was reasonable, there would be endless suits on the subject, and we would go over our experience in the law of negligence, where it has taken thousands of cases to enable us to get any more definite statement of the law than that a man should exercise *reasonable* care. It is sometimes questionable, and it may be here, whether justice to be obtained in each particular case by a jury is as advantageous as having definite rules of law, which may, until they are generally known, work substantial injustice. Take the very principle that the tenant

has to pay for his premises burnt or not, can any attorney point to a lease which has come under his notice which does not provide for the contingency of the premises being destroyed by an act of God.

The following are the principal American cases on the subject:

Massachusetts.—Here there is no implied warranty in the rent of a dwelling house that the house shall be habitable during the term: *Bowne v. Hunking*, 135 Mass. 380; *Poster v. Peyser*, 9 Cush. (Mass.) 242; *Welles v. Castles*, 3 Gray (Mass.), 323.

Nor that a store rented as a warehouse for dry goods shall be suitable for that purpose: *Dutton v. Gerriah*, 9 Cush. (Mass.) 89.

New York.—The Massachusetts rule on this question is adopted in New York: *Gillis v. Morrison*, 22 N. B. 207.

New Jersey.—*Naumburg v. Young*, 44 N. J. L. 331, 345. See remarks of *DUER*, J.

Of course, when a house is rented generally, with no circumstances which indicate that it must be used for a dwelling house only, there is no question that the landlord does not warrant it suitable for any particular purpose: *Howard v. Doolittle*, 3 Duer (N. Y.), 464. See remarks of *DUER*, J., on page 274; *Jaffe v. Harteau*, 56 N. Y. 398; *Cleves v. Willoughby*, 7 Hill (N. Y.), 83, per *BARDSLEY*, J.; *Scott v. Simons*, 54 N. H. 426; *Loupe v. Wood*, 51 Cal. 586; *Royce v. Guggenheim*, 106 Mass. 201-202, per *GRAY*, J.; *Robbins v. Mount*, 4 Robt. 553; *O'Brien v. Capwell*, 59 Barb. (N. Y.) 497; *Edwards v. N. Y. H. R. R. Co.*, 98 N. Y. 245-247, *EARLE*, J., and in Minnesota the courts have gone so far as to say that, where the lessor stated

in reply to the question of the lessee, that the sewer connected with the premises was in a good condition if he did not know the assertion to be false, he would not be liable to repair the drainage.

though the sewer was entirely out of order. This, however, is not law in Pennsylvania: See *Wolfe v. Arrott*, 109 Pa. 473.

W. D. L.

DEPARTMENT OF PRACTICE AND PLEADING.

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DALTON v. WEST END STREET RAILWAY CO.¹ SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Compromise of Suit by Attorney.

A compromise of a pending suit by an attorney, in violation of express instructions from his client, will not bind the latter; and when the parties can be placed in *status quo*, and application is seasonably made, the Court has power to vacate any judgment founded on such compromise, and to order it and the compromise stricken from the files.

POWER OF ATTORNEY TO BIND CLIENT BY COMPROMISE OR SETTLEMENT.

By the very fact of his employment, an attorney-at-law acquires complete control of the action, in so far as the management and direction thereof, and the remedy sought, are concerned; and he has an implied authority to do any acts, or take any steps, which merely relate to the conduct of the suit, or the remedy; but he cannot take any measures, or enter into any agreement, which tends to affect the *right of action*, without some express additional authority from the client. *Davis v. Hall*, 90 Mo. 659;

8. C., 3 S. W. Rep. 382. By virtue of this implied authority, he may waive the client's right of trial by jury by an agreement to refer the case to arbitrators: *Thomas v. Hewa*, 2 C. & M. 327; *Buckland v. Conway*, 16 Mass. 396; *Jenkins v. Gillespie*, 10 Sm. & M. (Mass.) 31; *Holker v. Parker*, 7 Cranch, 436; *Morris v. Grier*, 76 N. C. 410; *Bingham v. Guthrie*, 7 Harris (Pa.), 418; *Sergeant v. Clark*, 108 Pa. 588. May withdraw a juror: *Swinsfen v. Ld. Chelmsford*, 5 H. & N. 890; *Strauss v. Francis*, 1 L. R. Q. B. 379.

¹ Reported in 34 N. E. Rep. 261.

May restore an action after *non pros*: *Reinhold v. Alberti*, 1 Binn. 469. And, when several suits are brought by the same plaintiff against different defendants, the grounds of defence being the same in each case, the attorneys for the several parties may bind their clients by an agreement that all the cases should abide the final decision in one case: *R. R. v. Stephens*, 36 Mo. 150. It has also been held that the attorney may, without special authority, discontinue the suit: *Davis v. Hall*, 90 Mo. 659; *S. C.*, 3 S. W. Rep. 382; *Gaillard v. Smart*, 6 Cow. 385; *Simpson v. Brown*, 1 Wash. Ty. 247, but this is controverted in *Filby v. Miller*, 25 Pa. 264. And if allowable at all, can only be permitted when it is without prejudice, for an attorney has no power to release or abandon his client's claim to the defendant: *Smith v. Dixon*, 3 Mete. (Ky.) 434; *Gilliland v. Gausque*, 6 S. C. 406; *Hickey v. Stringer*, 21 S. W. Rep. 716.

On the other hand, an attorney cannot surrender any substantial right of his client, without the consent of the latter: *Dickerson v. Hodges* (N. J.), 10 Atl. Rep. 111. And it has even been held in that State that this applies to matters that relate to the conduct of the suit: *Howe v. Lawrence*, 22 N. J. L. 99; though, in view of the general rule as to such matters, it is difficult to understand how this can be true, unless there is proof of fraud or collusion on the part of the attorney.

Accordingly, without special authority, an attorney cannot waive his client's right to redeem the property in the action, or any steps necessary thereto: *Graves v. Long*, 87 Ky. 441; *S. C.*, 9 S. W.

Rep. 297. Cannot agree that the dismissal of a suit shall operate as a bar to the maintenance of an action thereon for malicious prosecution: *Marlboung v. Smith*, 11 Kan. 554. Cannot bind a landlord who has brought suit to evict a tenant, by an agreement that if the tenant will submit to a default, execution shall not be issued for a week, or if issued, shall not be served within that time: *Welland v. White*, 109 Mass. 392, nor make a valid agreement to extend the time of the payment of a judgment, or suspend proceedings thereon: *Beatty v. Hamilton* (Pa.), 17 Atl. Rep. 755; *Lockhart v. Wyatt*, 10 Ala. 231; *Pendexter v. Vernon*, 9 Humph. (Tenn.) 84. He cannot release the sureties upon a note or claim: *Stoll v. Sheldon*, 13 Neb. 207; *Givens v. Briscoe*, 3 J. J. Marsh (Ky.), 529; *Sav. Inst. v. Chinn*, 7 Bush. (Ky.) 539. Nor give an extension of time to the principal obligor on a note, especially when, if the act were valid, its immediate legal consequence would be the release of the sureties: *Roberts v. Smith*, 3 La. Ann. 205. Whether or not he has implied power to release property from the lien of an attachment is in some doubt. It seems to be the prevailing opinion that when the attachment is only an incident of the form of action, he may release it before judgment: *Monson v. Hawley*, 30 Conn. 51; *Moulton v. Bowker*, 115 Mass. 36; *Levy v. Brown*, 56 Miss. 83. But he certainly cannot release the lien of a judgment without express authority: *Dollar Sav. Bk. v. Robb*, 4 Brews. (Pa.) 106; *Doub v. Barnes*, 1 Md. Ch. 127; *Phillips v. Dobbins*, 56 Ga. 617. Even though he honestly believe that it will be for

the client's benefit : *Wilson v. Jennings*, 3 Ohio St. 528. So, too, without authority, he cannot assign or sell the client's claim : *Russell v. Drummond*, 6 Ind. 216 ; *White v. Hildreth*, 13 N. H. 104 ; *Child v. Eureka Powder Works*, 44 N. H. 354 ; *Cord v. Walbridge*, 18 Ohio 411 ; *Rowland v. State*, 58 Pa. 196 ; *Penniman v. Patchin*, 5 Vt. 346. Or judgment : *Head v. Gervais, Walk. (Miss.)* 431 ; *Rice v. Troup*, 62 Miss. 186 ; *Campbell's App.*, 29 Pa. 401 ; *Fawcett v. Middleton*, 47 Pa. 214 ; *Mayer v. Blease*, 4 S. C. 10. Not even to one of several judgment debtors who has paid the full amount of the judgment, and desires to secure contribution from the others : *Maxwell v. Owen*, 7 Coldw. (Tenn.) 630.

When the defendant has been arrested on *ca. sa.*, after judgment, the plaintiff's attorney has no authority to release him, without receiving actual payment of the debt : *Jackson v. Bartlett*, 8 Johns. (N. Y.) 361 ; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220 ; *Simonton v. Barrell*, 21 Wend. 362 ; *Carter v. Talcott*, 10 Vt. 471. Nor can he compromise a criminal prosecution on receiving part payment of funds misappropriated : *Harper v. Nat'l Ins. Co.*, 56 Fed. Rep. 281.

In Chancery, counsel have power to bind their clients by consent decrees, without special authority, provided there be no fraud or imposition : *Holmes v. Rogers*, 13 Cal. 191 ; *Williams v. Simmons*, 79 Ga. 649 ; *Jones v. Williamson*, 5 Coldw. (Tenn.) 371, but it is very doubtful whether they possess the power in similar circumstances to confess judgment in a court of law. In Indiana, New York and Texas, it has been held that they have that power, and that the client, if

injured, must look to the attorney for redress : *Thompson v. Penning*, 86 Ind. 303 ; *Denton v. Noyes*, 6 Johns. (N. Y.) 296 ; *Williams v. Nolan*, 58 Tex. 708. But the weight of authority is opposed to that view : *Preston v. Hill*, 30 Cal. 43 ; *Pfister v. Wade*, 69 Cal. 133 ; *Pro. v. Lamborn*, 2 Ill. 123 ; *Wadhams v. Gay*, 73 Ill. 413 ; *Edwards v. Edwards*, 29 La. An. 597 ; *Ohlquest v. Farwell*, 71 Iowa, 231. In an early case in Iowa, *Potter v. Parsons*, 14 Iowa, 286, it was held, that the attorney for the defendant may make a valid agreement for judgment against his client, if coupled with a stay of execution ; but this would seem to be overruled in *Ohlquest v. Farwell, supra*.

As the compromise or settlement of a suit strikes directly at the root of the cause of action, it would seem on principle that an attorney has no implied authority to make it except upon payment of the full amount due ; but the English decisions on this subject are far from being unanimous. In *Fraser v. Voules*, 1 El. & El. 839, the authority was denied, and it was held that an attorney could not make even a compromise that was reasonable, *bona fide*, and for the client's benefit, and that if he did so, he would be liable to an action for damages, though the actual damage was but nominal. In *Swinfen v. Swinfen*, 24 Beav. 549, *Rossilly, M. R.*, ruled to the same effect ; but on a previous motion in the same case in the Common Pleas, 18 C. B. 445, the court declared that they would not inquire into the authority of counsel to compromise, when done in the exercise of a sound discretion, and, in his opinion, for the best interests of his clients, on the ground that "it would be most fatal to the due

administration of justice, if we were to allow the authority of counsel to be thus questioned." *Sed quare?*

In *Swinfen v. Isl. Chelmsford*, 5 H. & N. 890, an action by the client against the counsel, growing out of the compromise in *Swinfen v. Swinfen*, *supra*, the more reasonable rule was adopted by the Exchequer that counsel may not bind their clients by any agreement collateral to the suit, and that, therefore, the compromise under consideration, which was that the plaintiff should give up her claim to the estate in question and receive an annuity instead, was not valid. But this ruling seems to admit that a *bona fide* compromise strictly germane to the subject matter of the suit, as the acceptance of a less sum than that claimed to be due on a contract, or as damages for an injury, will be binding on the client, in the absence of fraud or imposition. Such has been the doctrine of many of the cases; *Chown v. Parrott*, 14 C. B. (N. S.) 74; *Prestwich v. Foley*, 18 C. B. (N. S.) 806; *Thomas v. Harris*, 27 L. J. Exch. (N. S.) 353; *Re Wood, Ex p. Wenham*, 21 W. R. 104; *Butler v. Knight*, 2 L. R. Exch. 109. But some have gone even a step farther than this, and it seems to be now the settled rule in the English courts that an attorney, without special authority, has the implied power to bind his client by a *bona fide* compromise, even though made in violation of the client's express directions not to compromise, provided the other party also acts in good faith, and without knowledge of the prohibition: *Brady v. Curran*, 2 Ir. R. C. L. 314; *Berry v. Mullen*, 3 Ir. R. Eq. 368; *Strauss v. Francis*, 1 L. R. Q. B. 379.

In *Wharton on Agency*, § 590-2,

and *Story on Agency*, 9th Ed., § 24 (note by Greenough), it is stated that the general rule in America is the same as that in England; but in this instance these usually accurate writers have fallen into error. There are a few cases which declare that a reasonable *bona fide* compromise, made without special authority, will not be disturbed; but those very cases admit that the attorney, merely as such, has, in strict adherence to legal principles, no right to make it: *Holker v. Parker*, 7 Cranch, 436; *Whipple v. Whitman*, 13 R. I. 512; S. C., 43 Am. Rep. 42; *Roller v. Wooldridge*, 46 Tex. 485.

The true American rule, as is shown by the vast preponderance of authority, is, that, without express instructions, an attorney has no power, merely from his employment as such, to bind his client by any compromise or settlement for any amount less than the whole sum due or claimed, or to release any substantial right of his client, whether the action be pending, or have proceeded to judgment. He can do no act which destroys the cause of action without receiving payment: *Robinson v. Murphy*, 69 Ala. 543; *Pickett v. Rk.* 32 Ark. 346; *Ambrose v. McDonald*, 53 Cal. 28; *Trope v. Kerna*, 83 Cal. 553; S. C., 23 Pac. Rep. 691; *Dervort v. Loomer*, 21 Conn. 245; *Wadhams v. Gay*, 73 Ill. 415; *Miller v. Lane*, 13 Ill. App. 648; *Wakeman v. Jones*, 1 Ind. 517; *Miller v. Edmonston*, 8 Blackf. (Ind.) 291; *Repp v. Wiles* (Ind.), 29 N. E. Rep. 441; *Stuck v. Reese*, 15 Iowa, 122; *Martin v. Capital Ins. Co. (Iowa)*, 52 N. W. Rep. 534; *Smith v. Dixon*, 3 Metc. (Ky.) 438; *Lewis v. Gamage*, 1 Pick. (Mass.) 347; N. Y., N. H. & H. R.

R. v. Martin (Mass.), 33 N. E. Rep. 578; Eaton v. Knowles, 61 Mich. 635; Fitch v. Scott, 3 How. (Mass.) 314; Levy v. Brown, 56 Niss. 83; Davidson v. Rozier, 23 Mo. 387; Waldea v. Bolton, 55 Mo. 405; Spears v. Ledergerber, 56 Mo. 465; Semple v. Atkinson, 64 Mo. 504; Roberts v. Nelson, 22 Mo. App. 28; Moye v. Cogdell, 69 N. C. 93; Watts v. French, 19 N. J. Eq. 407; Hamrick v. Combs, 14 Neb. 381; Shaw v. Kidder, 2 How. Pr. (N. Y.) 243; Mandeville v. Reynolds, 5 Hun. (N. Y.) 338; S. C. Aff., 68 N. Y. 528; Beers v. Hendrickson, 45 N. Y. 665; De Mets v. Dagron, 53 N. Y. 635; Barrett v. Third Av. R. R. Co., 45 N. Y. 628; Chambers v. Miller, 7 Watts. (Pa.) 63; Pilby v. Miller, 25 Pa. 264; Stokely v. Robinson, 34 Pa. 315; Housenick v. Miller, 93 Pa. 514; Mackey v. Adair, 99 Pa. 143; Twp. of North Whitehall v. Keller, 100 Pa. 105; Isaacs v. Zagumith, 103 Pa. 77; Brockley v. Brockley, 122 Pa. 1; Smith v. Bosnard, 2 McCord, Ch. 406; Bradford v. Arnold, 33 Tex. 412; Adams v. Roller, 35 Tex. 711; Smith v. Lambert, 7 Gratt. (Va.) 142; Vail v. Jackson, 15 Vt. 314; Granger v. Batchelder, 54 Vt. 248; Crotty v. Eagle, 35 W. Va. 143; Kelly v. Wright, 65 Wis. 236; Holker v. Parker, 7 Cranch, 436; Pierce v. Brown, 8 Biss. C. Ct. 534. "The attorney has no right to commute the debt of his client, to release the person of his debtor when in prison by virtue of a *ca. sa.*, or to enter a *retrahit* in a suit, to execute a release, or to do any other act which destroys the cause of action without receiving payment:" Smith v. Lambert, *supra*. *A fortiori*, does this rule hold good when the client has given positive

instructions not to compromise; Dalton v. R. R. (the principal case) (Mass.), 34 N. E. Rep. 261, or when there is a marked discrepancy between the amount due or claimed and the amount for which the compromise is made, as in Hamrick v. Combs, 14 Neb. 381, where the compromise was for about one-third the face value of a good judgment. "When the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized, and being therefore in itself void, ought not to bind the injured party. Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or, if it is not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it:" C. J. MARSHALL, in Holker v. Parker, 7 Cranch, 436.

This rule practically amounts to no more than a reaffirmation of the acknowledged principle that he who deals with a special agent must look to the extent of his authority. The debtor in such a case is put on inquiry as to the authority of the attorney and settles with him at his own peril: Miller v. Lane, 13 Ill. App. 648. And it makes no difference what form the transaction may take,

whether it be entitled by the parties as an award or a judgment, or be honestly styled a compromise, it will still be subject to avoidance by the courts: *Holker v. Parker, supra*; *Stokely v. Robinson*, 34 Pa. 315. Even if the client lives in another State, express authority must be obtained before the compromise will be valid: *Granger v. Batchekler*, 54 Vt. 248; S. C., 41 Am. Rep. 846.

An attorney retained to secure possession of real estate by legal proceedings, cannot bind his client by an agreement to pay the party in possession a sum of money in consideration of the surrender of the premises: *Stuck v. Reese*, 15 Iowa, 122. And when there are several plaintiffs, those only who assent to the compromise will be bound, and the attorney must account to those who do not assent for the full amount of the claim: *Repp v. Wiles* (Ind.), 29 N. E. Rep. 441.

This rule is not iron-clad, however, and it may be abrogated by equitable considerations. As we have seen, the courts will be slow to disturb a reasonable compromise made by the attorney in a *bona fide* belief that he is acting for the best interests of his client: *Holker v. Parker, supra*; *Whipple v. Whitman*, 13 R. I. 512; S. C., 43 Am. Rep. 42; *Roller v. Woodbridge*, 46 Tex. 485; *Bonney v. Morrill*, 57 Me. 368; *Black v. Rogers*, 75 Mo. 441; *Peo. v. Quick*, 92 Ill. 580; *Re Heath's Will* (Iowa), 48 N. W. Rep. 1037. Such a compromise will also be held valid, where there is no time or opportunity for consultation with the client, and his interests may be seriously imperilled by delay: *Union Mut. Life Ins. Co. v. Buch-*

anan, 100 Ind. 63; *Rockley v. Brockley*, 122 Pa. 1. So, when the plaintiff is only a titular party, and a fair and judicious compromise is made with the knowledge and assent of the real party in interest, it will be upheld: *Whipple v. Whitman, supra*.

As the attorney cannot, without express authority, compromise for less than the amount due or claimed, neither can he, unless specially authorized, receive anything but money in payment of a debt or satisfaction of a judgment: *Gullett v. Lewis*, 3 Stew. (Ala.) 23; *McCarver v. Nealey*, 1 G. Greene (Iowa), 360; *Graydon v. Patterson*, 13 Iowa, 256; *Drain v. Doggett*, 41 Iowa, 682; *Bigler v. Toy*, 68 Iowa, 687; *Perkins v. Grout*, 2 La. An. 328; *Phelps v. Preston*, 9 La. An. 488; *Keller v. Scott*, 10 Miss. 81; *Baldwin v. Merrill*, 8 Humph. (Tenn.) 132; *Anderson v. Boyd*, 64 Tex. 108. And this money must be legal currency of the United States: *Bailey v. Bagley*, 19 La. An. 172; *Lord v. Burbank*, 18 Me. 178. But a payment made in Virginia, in 1862, in confederate currency, then the only currency, was held good, as the client had not expressly forbidden it: *Pidgeon v. Williams*, 21 Gratt. (Va.) 251. Similar payments, however, made in Louisiana and West Virginia, during the war, were held not valid: *Davis v. Lee*, 20 La. An. 248; *Harper v. Harvey*, 42 W. Va. 539. But when the creditor, on being informed of the payment, did not notify the attorney of his objections to receiving such money, he was held concluded by his silence: *Johnson v. Gibbons*, 27 Gratt. (Va.) 632.

The attorney cannot take in payment, or as collateral security, with-

out special authority, notes of third persons: Cook v. Bloodgood, 7 Ala. 603; Jeter v. Haviland, 24 Ga. 252; Jones v. Ransom, 3 Ind. 327; Garvin v. Lowry, 15 Miss. 24; Langdon v. Potter, 13 Mass. 318; Kent v. Chapman, 18 W. Va. 485. Or of himself: Cook v. Bloodgood, *supra*; Vanderline v. Smith, 18 Mo. App. 55. Bonds: Smock v. Dade, 5 Rand (Va.) 639; Wilkinson v. Holloway, 7 Leigh. (Va.) 277; Kent v. Ricardo, 3 Md. Ch. 392; Kent v. Chapman, 18 W. Va. 485. Drafts: Fortis v. Ennis, 27 Tex. 574. Depreciated money or bank paper: Chapman v. Cowles, 41 Ala. 103; West v. Ball, 12 Ala. 340; Trumbull v. Nicholson, 27 Ill. 149. County warrants: Herrman v. Shomon, 24 Kan. 387. An assignment of a judgment: Clark v. Kinpland, 9 Miss. 248. Or a debt secured by mortgage: Walker v. Scott, 13 Ala. 644. Nor can he take other property, real or personal, as land: Huston v. Mitchell, 14 S. & R. (Pa.) 307; Stackhouse v. O'Hara, 14 Pa. 88. Wood: Pitkin v. Harris, 69 Mich. 133. Houses, merchandise, &c.: Comra v. Rose, 1 Dessau. (S. C.) 461. *A fortiori* he cannot take in payment or satisfaction a debt due by himself, to another, or permit the debtor in the action to set such a debt off against the plaintiff's claim on settlement: Gullett v. Lewis, 3 Stew. (Ala.) 23; Cost v. Genette, 1 Forb. (Ala.) 212; Craig v. Ely, 5 Stew. & P. (Ala.) 254; Keller v. Scott, 10 Miss. 81; Vanderline v. Smith, 18 Mo. App. 55; Hamrick v. Combs, 14 Neb. 381; Wilkinson v. Holloway, 7 Leigh. (Va.) 277; Wiley v. Mahood, 10 W. Va. 206. But cases can be readily imagined in which the note of a third person of responsibility would be far better than the security of even a judgment against the

debtor; and in these it is hardly likely that the courts would enforce the technical rule, even if the client were foolish enough to object: See Livingston v. Radcliff, 6 Barb. (N. Y.) 201; Dolan v. Van Demark, 35 Kan. 303.

Though he cannot take part of the debt or claim in satisfaction of the whole, an attorney may, nevertheless, receive partial payments: Hall Safe & Lock Co. v. Harwell, 88 Ala. 441; Pickett v. Bates, 3 La. An. 627. And when a note is collected part in money, and a security is given for the balance, the money payment is good *pro tanto*: Davis v. Severance (Minn.), 52 N. W. Rep. 140.

But, as in all other cases of unauthorized action by agents, these acts of the attorney may be ratified by the client, by conduct as well as by words: Peo. v. Lamborn, 1 Scam. 123; Nolan v. Jackson, 16 Ill. 272; Jennings v. McConnell, 17 Ill. 148; Trumbull v. Nicholson, 27 Ill. 149; Melvin v. Ins. Co., 80 Ill. 446; Wetherbee v. Fitch, 117 Ill. 67; Moyer v. Cogdell, 69 N. C. 93; Terhune v. Colton, 10 N. J. Eq. 21.

A compromise is good, if made in the presence of the client, and he does not dissent: Chambers v. Mason, 5 C. B. (N. S.) 59. If he acquiesces in it, after being fully informed of the transaction, by remaining silent, or by receiving the fruits of it: Abbe v. Rood, 6 McLean (U. S.) 106; Mayer v. Foulkrod, 4 Wash. C. C. 503; Maddux v. Bevan, 39 Md. 485; Sciple v. Atkinson, 64 Mo. 504. Or by neglecting to dissent from or repudiate the compromise within a reasonable time: Swinfen v. Swinfen, 24 Beav. 549; Black v. Rogers, 75 Mo. 441; Benedict v. Smith, 10

Paige (N. Y.), 126; Whipple v. Whitman, 13 R. I. 512; S. C., 43 Am. Rep. 42. If one of several payments to the attorney in specific articles is received by the principal, and no objection is made, such payments will go in discharge of the debt in the same way as if made in money: Patten v. Fullerton, 27 Me. 58.

The remedies of the client are many and various. He may proceed against the attorney, if he choose, so ratifying his action and discharging the debtor: Chapman v. Cowles, 41 Ala. 103; Lord v. Burbank, 18 Me. 178; Fitch v. Scott, 3 How. (Mass.) 314. If judgment has been entered on the compromise, he may have it vacated:

Dalton v. West End St. Ry. Co. (the principal case) (Mass.), 34 N. E. Rep. 261. If that has not been done, he may ignore the compromise, and proceed with the original action: Jones v. Inness, 32 Kan. 177; Davis v. Severance (Minn.), 32 N. W. Rep. 140; Dooley v. Dooley, 9 Lea. (Tenn.) 306. Or if the compromise be made on a judgment, after issuing execution, he may release execution: Wright v. Daily, 26 Tex. 730.

The rules laid down in the preceding discussion apply to proctors in admiralty, equally with attorneys: Bates v. Seabury, 1 Sprague, 433.

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LUMBERVILLE, DELAWARE, BRIDGE CO., v. STATE BOARD OF ASSESSORS. SUPREME COURT OF NEW JERSEY.

*Constitutional Law. Taxation of Corporate Stock.
Interstate Commerce.*

STATEMENT OF CASE.

The corporation plaintiff was incorporated by the concurrent legislation of New Jersey and Pennsylvania. Some of the officials were resident in one State, others in the other. Toll gates were erected on the Pennsylvania bank and tolls collected there. Taxes on one-half

of the bridge (considered as a *structure*, without reference to the extent of travel upon it, or the profits derived from it) were paid annually to New Jersey, and on the same basis with regard to the other half taxes were paid to Pennsylvania.

The Legislature of New Jersey

passed a further Act (April 19th, 1884), entitled "An Act to provide for the imposition of State taxes upon certain corporations, etc.," which required from the corporation plaintiff, the payment of "a yearly license fee or tax of one-tenth of one per cent. on the amount of the capital stock."

The payment of the latter tax was made under protest, and was resisted on these grounds (the above statement of facts being agreed upon): 1st, that this was a tax upon interstate commerce, and so in violation of the Constitution of the United States; 2d, that upon the principles of public law, the power of erecting a bridge or taking tolls

thereon, over a navigable river, which forms the co-terminous boundary between two States, can only be conferred by the concurrent legislation of both States, and such charters are subject to alteration and repeal in a like manner only; 3d, that the corporation being a foreign corporation, collecting tolls at its gates, within the jurisdiction of Pennsylvania, the State of New Jersey could not impose a tax by way of a license fee upon it or upon its franchises; and 4th, that even if the tax were valid, the assessment should have been made upon one-half the amount of the capital stock instead of upon the whole amount.

OPINION OF THE COURT.

The Court (GARRISON, J., delivering the opinion) upheld the constitutionality of the tax, saying that the Federal Constitution will not invalidate a State tax imposed upon domestic corporations, *generally* because it *incidentally* affects one that, under State authority, is engaging in interstate commerce. "This yearly license fee, continued the Court, is, in short, a poll tax levied upon domestic corporations for the right to be, without regard to the powers that under such form they may exercise. Such a fee may be exacted by the State from which the right is derived without

reference to the nature of the business the corporation may be authorized to carry on, and is constitutional, even as against a domestic corporation created for the purpose of engaging in commerce with an adjoining State." The fourth ground of objection the Court answered by saying that the right of corporate existence is, in its nature, indivisible, and the fee, therefore, must be necessarily an entirety, no matter where the property of the company is situated, or how its capital is invested or employed.

STATE TAXATION OF CORPORATE FRANCHISE.

That the power to regulate commerce between the States is committed exclusively to Congress, and that, unless it chooses to exercise its power in that direction, such commerce shall be free from statutory regulations of any kind, is a well-established principal of constitutional law: *Robbins v. Taxing*

District, 120 U. S., and the long list of cases there cited by Mr. Justice BRADLEY.

The word *regulation* has grown to have a more or less technical, or rather special meaning as employed by the federal Supreme Court. In *State Tax on gross Receipts*, 15 Wallace, 244, the fol-

lowing words are used: "It is not everything that *affects* commerce that amounts to a *regulation* of it, within the meaning of the constitution." (See also *Robbins v. Taxing District*, *supra*.)

The police power of the States authorize the passage of Acts which may affect interstate commerce by virtue of the right and duty to provide for the "security of the lives, limbs, health and comfort of persons." Legislation which deals distinctly with the physical welfare and happiness of the citizen falls naturally within this class. The exception is even extended, and, under this same police power, the States may secure the protection of property, although business which reaches beyond the State limit may be incidentally *affected* thereby.

But wherever such purely police regulations are made by a State, or wherever a State enacts laws, less distinctly recognizable as falling within that class, such as the establishment and supervision of highways, canals, ferries, railroads, bridges and other commercial agencies, and facilities the operation of the law must not *directly* affect interstate commerce. This, then, would seem to be the test: Does a State law whose constitutionality is impeached on these grounds, operate directly against an interstate business, whatever may be its character, or does it merely reach in a casual way one or more of the agencies of that business. The law must, of course, be in other respects legitimate.

In considering the long line of cases decided by the United States Supreme Court, involving the constitutionality of State laws alleged to be in conflict with the com-

merce clause of the constitution, the subject of taxation is the important one. The damming of a navigable stream is a rare occurrence as compared with the tolls charged for transportation over its ferries or on its bridges. The general subject of taxation cannot be considered here, but the cases in which the Supreme Court has passed upon State legislation extending through various forms of taxation to the commerce which claimed exemption from its operation under the federal law sufficiently indicate the line of argument by which the New Jersey Court reached its conclusion in this case. The case may be divided into two general groups: first, those in which the State law has been set aside as an unwarrantable regulation of commerce; and second, those which upheld the legislation, notwithstanding that it may have had an incidental effect or influence upon that commerce.

Within the first group may be first considered the instances in which the State law imposes a burden upon the citizens of other States doing business within its territory, from which its own citizens are exempt. In *Guy v. Baltimore*, 100 U. S. 434, the city of Baltimore passed an ordinance requiring the payment of fees for the use of the city's wharves by all vessels laden with the products of other States, but exempting those landing with Maryland products. The court said that "these fees must be looked upon, not as a compensation for the use of the city's property, but as a mere expedient or device to foster the domestic commerce of Maryland by means of unequal and oppressive burdens upon the industry and business of other States." This was a case of dis-

crimination pure and simple. In *Webber v. Virginia*, 103 U. S. 344, a Virginia statute required the agent of manufacturers without the State to obtain county license fees and pay a specific license tax in Virginia before selling his goods, but excepted the agents of Virginia manufacturers from the operation of the law. "Commerce among the States is not free," said the court, "whenever a commodity is, by reason of its foreign growth or manufacture, subjected by State legislation to discriminating regulations or burdens, the statute is in conflict with the commerce clause of the constitution and void:" (Mr. Justice FIELDS.)

In *Walling v. Michigan*, 116 U. S. 446, practically the same state of facts existed as in the above case. The license tax in question was, however, levied upon the sale of intoxicating liquors manufactured in other States, a subject which would seem to fall more clearly within the police power of the State. The case illustrates the force of the constitutional protection over interstate commerce in the face of the highest power claimed by the States.

Asher v. Texas, 128 U. S. 129, and *Stoutenburgh v. Hennick*, 129 U. S. 141, are further examples of discrimination.

But it is not on the ground of discrimination only that a state tax may be declared void. The nature of the subject, upon which the tax is levied, is sometimes sufficient to cover it with the cloak of federal authority and protection. In case of *State Freight Tax*, 15 Wallace, 232, the State of Pennsylvania passed an Act taxing freight transported over the railway, etc., without regard to whether it was car-

ried beyond the State limits or not. The court held that "the transportation of freight, or of the subjects of commerce, is a constituent part of commerce itself, and that, whenever the subject is regard to which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system of regulation, they are exclusively within the regulating control of Congress. Transportation of passengers or merchandise through a State, or from one State to another is of this nature."

Cook v. Pennsylvania, 97 U. S. 566, is an example of a State tax levied nominally upon an occupation, but really upon the subject of the business. The tax in question was upon the amount of sales of goods made by auctioneers. The Court held that it amounted to a tax on the goods themselves, and consequently as applying to imported goods in the original packages was unconstitutional.

See also *Brown v. Houston*, 114 U. S. 622, and *Lyng v. Michigan*, 135 U. S. 161.

The State tax may be void, not only as discriminating against citizens of other States, or as burdening directly the goods transported but also as being a tax upon the business engaged in interstate commerce, because imposed upon the business itself directly or upon its earning, methods or agencies.

The following cases declared State Acts void as affecting directly interstate business: *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *W. U. Tel. Co. v. Texas*, 103 U. S. 460; *Wabash St. L. & P. R. Ry. Co. v. Illinois*, 118 U. S. 557; *Telegraph Co. v. Ratterman*, 127 U. S. 411; *Leloup v. Mobile*, 127 U. S. 640.

In these the tax was or amounted to a tax on earnings: *Pargo v. Michigan*, 121 U. S. 230; *Phil. & Southern S. S. Co. v. Penna.*, 122 U. S. 326. While the following are examples of taxes operating against the agencies of commerce: *Robbins v. Taxing Dist.*, 120 U. S. 489; *McCall v. California*, 136, U. S. 104; *Railroad Co. v. Penna.*, 136 U. S. 114; *Crutcher v. Kentucky*, 141 U. S. 47.

The cases which comprise the second general group, or those in which State legislation has been upheld, were where interstate commerce was incidentally affected may now be considered.

The levying of a tax on the ferry boats owned by ferry keepers living within the State, was held, in *Wigin's Ferry Co. v. East St. Louis*, 107 U. S. 363, a valid regulation imposed under the State police power. The Court said that "the power to license is a police power, although it may also be exercised for the purpose of raising revenue." See also *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217.

The right to impose fees for wharfrage is upheld, although the wharf owner may be a municipal corporation and the steamboats mooring thereat enrolled and licensed: *Packet Co. v. Keokuk*, 95 U. S. 80. See also *Packet Co. v. East St. Louis*, 100 U. S. 428; *Parkersburg Transportation Co. v. Parkersburg*, 107 U. S. 698; *Packet Co. v. Alker*, 121 U. S. 444.

It remains to note the instance in which the capital stock and similar property of corporations have been taxed and, finally, the question to what extent the less tangible corporate franchises and privileges are liable.

In *W. U. Tel. Co. v. Att'y-Gen-*

eral, 125 U. S. 530, the State of Massachusetts had imposed a tax upon the W. U. Telegraph Co. upon its property owned and used within the State, the value of which was ascertained by comparing the length of its lines in that State with the length of its entire lines. The Court declared the tax to be distinctly an excise tax. The tax was levied upon the capital stock of the company. It was upheld by the Court.

In *Pullman's Palace Car Co. v. Penna.*, 141 U. S. 18, it was held that "a State statute imposing a tax on the capital stock of all corporations engaged in the transportation of freight and passengers within the State, under which a corporation of another State engaged in running railroad cars into, through and out of the State, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State, bears to the whole number of miles in this and other States over which its cars are run, does not violate the commerce clause of the constitution."

Thus, the capital stock of a foreign corporation doing business within another State is the proper subject of taxation in the latter State, provided that the basis of assessment is not the whole of the stock, but only that which stands for the amount of property owned or operated in the taxing State.

Does the same rule apply in the taxing of franchises and privileges? In *Delaware R. R. Tax*, 18 Wallace, 206, the Court said, "the State may impose taxes upon the corporation as an *entity* existing under its laws, as well as upon its capital

stock or its separate corporate property." (See also *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217.)

In *Horn Silver Mining Co. v. New York*, 143 U. S. 305, a statute of New York imposed a tax upon the corporate franchise or business of every corporation, etc., incorporated or organized by the law of that State or of any other State, but doing business in New York, the tax to be computed by a percentage upon its whole capital stock. The corporation in question was incorporated in Utah, but did a small part of its business in New York. The tax was upheld. The Court said, that "the right and privilege, or the *franchise*, as it may be termed, of being a corporation is of great value to its members, and is considered as property, separate and distinct from the property the corporation itself may acquire." Continuing, the Court declared that the tax being valid in other ways did not operate as a burden upon or interference with interstate commerce, as it was neither directed against any of the subjects of that commerce nor discriminated against the citizens of other States.

It is upon this latter case that the New Jersey Court appears to have principally based its decision, although the Court makes the following distinction as to the use of

the word "franchise" in the two instances, saying "The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the State, whereas the franchise with which we have to do, is the right to exist in corporate form without reference to the powers that, make that form, the company may exercise. In this State (New Jersey) we tax each of these so called franchises. The latter tax is, in short, a poll tax levied upon a domestic corporation for the right to be. Such a tax is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on."

The doctrine of this case may be said to be this: That a State tax levied upon a corporation engaged in a business of an exclusively interstate character, although based upon the whole amount of the capital stock, whether it be held within the State or not, does not conflict with the federal power over interstate commerce, provided that the corporation is incorporated within the State, and falls within the operation of a law in other respects valid. The fact that the corporation was also chartered in the neighboring State, does not alter the question.

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PEOPLE'S STREET RAILWAY CO. v. SPENCER.¹*Insurance Money. Lessee with option to purchase.*

Plaintiff conveyed land to defendant by deed, and received \$30,000, the consideration money mentioned therein. By a lease of the same date, defendant leased the premises to plaintiff for one year at a nominal rent, and in the lease gave an absolute and exclusive option to the plaintiff to purchase the land at the end of the year for \$30,000 and interest. At the end of the term, the arrangement was extended for another year. Plaintiff insured the buildings on the property for defendant's protection, the policy to be "payable to him as his interest may appear." Before the expiration of the second year the buildings were burned. After the fire, the plaintiff exercised the option received from the defendant, and paid him \$30,000. Defendant claimed insurance money. *Held*, that on the exercise of the option to redeem, plaintiff's equitable title reverted back to the date of the original agreement, and plaintiff became the owner of the land as it was at such date, or of the insurance money which stood *pro tanto* in its place.

Opinion by MITCHELL, J.

THE RIGHTS OF VENDOR AND VENDEE IN RESPECT OF A POLICY OF INSURANCE UPON PROPERTY SOLD.

Among recent decisions in the domain of insurance law none has raised more important questions or furnished a basis for more interesting speculations than the decision of the Supreme Court of Pennsylvania in *Peoples' Street Railway Co. v. Spencer* (37 Atl. Rep. 113; 156 Pa. 83; July 19, 1893). Both upon principle and authority, there seems to be no doubt that the deci-

sion of the Court is correct, and Mr. Justice MITCHELL, in a clear and terse opinion, bases this decision upon intelligible grounds. It seems to the writer, however, that the court might with advantage have taken the opportunity to reduce the problem before them to its simplest form and to solve it with reference to two fundamental principles of the law of fire insur-

¹ Reported in 156 Pa. 83.

ance; one, that insurance is a personal contract and does not run with the land; the other, that the controlling feature of fire insurance is that it is a contract of indemnity. If this course had been adopted, it is conceived that the case before the court would have been seen to bear an interesting relation to the leading English cases of *Rayner v. Preston* (L. R. 18 Ch. D. 1, 1881) and *Castellain v. Preston* (L. R. 11 Q. B. D. 380, 1883), as well as to certain earlier cases decided by the Supreme Court of Pennsylvania, especially *Reed v. Lukens*, 44 Pa. 208 (1863).

The case of the Peoples' Street Railway Co. v. Spencer was an action brought by the corporation against Spencer to determine the rights of the parties to certain money deposited by a fire insurance company in payment of a loss by fire. It appeared that the company had been the owners of the property in question, and that in consideration of a payment of \$20,000 by Spencer a conveyance of the property was executed to him and a lease back to the company at a nominal rent with no change of possession, which remained all the while in the company. This arrangement included the giving by Spencer to the company of an absolute and exclusive option to re-purchase at the end of the year for the same sum with interest. At the end of the year the company paid up the interest, and the arrangement was renewed for another year. During the continuance of the agreement the company effected an insurance upon the premises and paid the premium. In the policy the company were described as the assured, and there was inserted therein the fol-

lowing clause: "The interest of the assured in the above described building is the right to purchase from A. D. Spencer, owner; and, in case of loss, the insurance is payable to him, as his interest may appear under said contract." The property was destroyed by fire, and pending this action (which was instituted as the result of an agreement between the company and Spencer) the company exercised the option to purchase and took a conveyance upon payment of the purchase money.

After stating the facts the opinion of Mr. Justice MITCHELL proceeds, as follows:

"It is unimportant what name we apply to the relation of the parties during the year. Whether technically vendor and vendee, mortgagor and mortgagee, or lessor and lessee, is immaterial. The nature of the relation is incontestable. Appellant was the holder of the legal title, subject to an equity in the company. It is strongly argued for appellant that his interest at the time of the fire was an absolute fee-simple title. But this is an error. It was not absolute. It was the legal title in fee, but subject to the equitable interest of the company, an interest in the land, capable of being specifically enforced, and good, not only against the appellant, but all others, creditors, purchasers or strangers, to whom the recorded deeds and the company's possession gave notice.

The only substantial question in the case is the date at which the company's equity became complete. The fire took place during the running of the term. The option to redeem was exercised after the fire had occurred. Did the company's interest begin to run only from the

exercise of its option, or did it, upon that event, relate back for all purposes to the transaction? We are of opinion that both principle and authority sustain the latter view. As already said, the transaction was in substance a loan of money, and appellant's right was to have his money back with interest at a specified time, or, in default of that, to have his title become absolute. The insurance was for his protection, not to increase his profit; to keep up the sufficiency of his security while the loan lasted, or make good the value of his purchase, if it became absolute. For that reason it was to be kept up by the appellee. If the latter had exercised its option before the fire, there could have been no question that the insurance money would have belonged to it. But the date of the fire makes no substantial difference when, as was the case, the appellee elected to repay the loan, and resumed its title. On the happening of that contingency, the appellant got his money, with interest, which was all he was entitled to; while the appellee got back its land, lessened in value by the fire, but the loss compensated by the insurance money. The insurance was, in contemplation of law, for the benefit of whomever should be entitled when the option was exercised or expired by default, and, in fact, it was contracted for "as interest may appear." It stood in place of so much of the property as was destroyed by the fire, and followed the title when the equitable and legal interests united. The authorities, so far as we have any analogous case, lead to the same conclusion. It was held in *Kerr v. Day*, 14 Pa. 112, that an option to purchase is a sub-

stantial interest in land, which may be conveyed to a vendee; and the English chancery cases were reviewed by *ExLL. J.*, with the result that, "when the lessee made his option to purchase, he was to be considered as the owner *ab initio*. Indeed, the determination can only be supported by attributing to the lessee an equivalent estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election." And in *Prick's Appeal*, 101 Pa. 485, where the land was sold upon a prior judgment before payment or conveyance, it was held that the surplus was the property of the optional vendee. It is true that the option in that case had been exercised before the levy and sale, but that circumstance was not of controlling weight, as the decision was put on the ground that "in equity the vendee became the owner, subject to the payment of the price stipulated. His right of property therein flows from the contract, and exists before any purchase money may have been paid." Citing *Siter's Appeal*, 26 Pa. 178. We are of opinion that, upon the exercise of its option to redeem, the appellee's equitable title reverted back to the date of the original agreement, and appellee became the owner of the owner of the land as it was at such date, or of the insurance money, which stood *pro tanto* in its place.

Before discussing the case further it will be well to summarize the other decisions to which reference has been made.

In *Rayner v. Preston*, it appeared that the plaintiffs had purchased

from the defendants a message and workshops. Between the date of the contract and the time fixed for settlement, the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact or of the policy. The vendors collected the policy money from the insurance office, and the vendees brought an action to establish their right to the money thus received or to have it applied in or towards reinstating the buildings injured. Against the dissent of JAMES, L. J., it was decided by the Court (affirming the judgment of Sir GEORGE JESSEL) that the action was not maintainable. The following extract from the opinion of Lord Justice BRYTT exhibits the grounds of the decision more clearly than any statement that the writer could make:—

"It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the plaintiffs and the defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy if an

accident which is within the insurance happens, is a payment of money. It is true that, under certain circumstances, in a fire policy there may be an option to spend the money in re-building the premises, but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons and two persons only, as a contract.

In this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of any one interested other than themselves. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the plaintiffs. It was a personal contract between the defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in equity, be assigned so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor

implicitly, was assigned to the plaintiffs, and, so far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants.

But there did exist a relation between the plaintiffs and the defendants, but with regard to the subject-matter of the insurance, there was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to the premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a Court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and is the result of the contract? Whether there shall ever be a conveyance depends on two conditions: first of all, whether the title is made out; and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose, at the time when the contract should be completed, the title should be made out and the money

is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a Court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued, due, and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties, to say, that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a court of equity will, under certain circumstances, decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it."

LORD JUSTICE BRETT, having expressed a doubt whether, as between the defendants and the insurance company, the defendants could keep the money, the company instituted the suit of *Castellain v. Preston*, in respect of the money which had been paid by the company to the defendants on account of the loss by fire. The vendors having (as before stated) insisted upon a completion of the purchase, and having, therefore, received the full contract price, which became due and payable, irrespective of the fact of the happening of the loss, the Court held that the underlying principle of indemnity required such an application in favor of the insurer of the right of subrogation, as to entitle the company to recover from the vendors so much of the money received from the vendees, as was equal to the amount paid by the company in consequence of the loss. "The very foundation, in my opinion," said Lord Justice BRETT, "of every rule which has been applied to insurance law is this, namely: that the contract of insurance contained in a marine or fire policy, is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it—that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity—that proposition must certainly be wrong."

The principle of *Castellain v. Preston* is not of as great importance in this country as in England, because, here, such a case as *Raynor v. Preston*, would be decided differently. Here the tendency of the Courts is to ignore the objections suggested by Lord Justice BRETT, and to treat the vendor under articles as trustee for the vendee. Accordingly, it is said that an insurance by the vendor is *prima facie*, an insurance of the whole estate—legal and equitable—and that the vendor will take the policy money as trustee for the vendee. See *Insurance Company v. Uplegraff*, 21 Pa. 513; *Nelson v. Insurance Company*, 43 N. J. Eq. 256; *International Trust Company v. Borlman*, 149 Mass. 161. In *Reed v. Lukens*, (44 Pa. 200), under facts similar to those in *Raynor v. Preston*, the Court held that the vendor must account in equity to his *cresui que trust*, for the insurance money received by him.

If, now, we recur to the principal case, the following considerations will be seen to be applicable:

1. If the Railway Company with the option to purchase, had effected insurance in its own name, and had subsequently exercised the option, it could, without doubt, have recovered upon the policy. Under the contract, the company had a valid insurable interest, and after the loss it would, in collecting the insurance money from the company, be receiving no more than the indemnity which the parties had in view when the contract was made.

2. If Spencer, the lessor, had insured in his own name, and had collected the money from the company, and had then, upon the exercise of the option received the

purchase money in full, different results would have followed according as the jurisdiction in which the case arose was English or American. In England, the insurance company could have recovered from Spencer (agreeably with the rule laid down in *Castellain v. Preston*) so much of the purchase money as was equivalent to the policy money. If this were not so, the vendor, instead of being merely indemnified would make a profit. The vendee would not be entitled to the proceeds of the policy, for the insurance was not effected for his benefit, and being a personal contract, does not run with the land. Nor, as has been seen, will the English Courts carry the doctrine of trusteeship far enough to protect him. In the

United States, however, (if the doctrine of the principal case is correct), it would seem that the lessor, under such an arrangement as that before the Court, is a trustee for the lessee with the option to purchase, just as in the case of vendor and vendee under articles. It follows, therefore, that even if Spencer had effected the insurance in the principal case in his own name, the vendee would have been entitled to call him to an account in equity for the policy money. Accordingly, it should seem to be clear that the vendee, upon completing the purchase has an even stronger claim to the policy money, where, as here, the insurance was effected "as interest may appear."

GEORGE WHARTON PEPPER.

[NOTE:—In the March number of the *American Law Register and Review* there will appear a comment upon the case of *Castellain v. Preston* (*supra*), by GEORGE RICHARDS, Esq.]

DEPARTMENT OF PROPERTY.

EDITOR-IN-CHIEF,

HON. CLEMENT PENROSE.

Assisted by

ALFRED ROLAND HAIG. WILLIAM A. DAVIS. JOSEPH T. TAYLOR.

BURY v. YOUNG ET AL.¹ SUPREME COURT OF CALIFORNIA.

Deed—Validity—Delivery to third person with instructions not to deliver to grantees till death of grantor.

When the grantor executes a deed of real estate, and delivers it to a third party, with instructions merely to hold it, without recording, until his death, and then to deliver it to the grantees, the grantor cannot recall the deed, nor alter its provisions, and has no interest in the land, except a life estate; the delivery to the depository makes him a trustee of the deed for the grantees; and his subsequent delivery to them, in pursuance of his instructions, is a valid delivery, though made after the death of the grantor, for the estate vests at the time of the delivery to him.

¹ Reported in 33 Pac. Rep. 338.

STATEMENT OF FACTS.

The plaintiff, in the above case, Mrs. Bury, and the defendant, Mrs. Young, were sisters, daughters of one M. A. Hinkson. Their father, while suffering from a paralytic stroke, called to his bedside one Hazen, an attorney-at-law, for legal advice as to the disposition of his property; and acting upon his advice, signed and acknowledged a grant deed of his real estate, in which his aforesaid daughters were named as grantees. This deed he gave to Hazen with instructions not to record it, but to deliver it to the grantees upon his death. He appears to have recovered from his sickness, and afterwards endeavored to secure possession of the deed from Hazen, but without success. He then subsequently made a will devising all his real estate to Mrs. Young. After his death Hazen delivered the deed in question to Mrs. Bury, who brought this action of partition, and relied on the deed to support her claim. This the Court upheld, on the ground that the title passed with the delivery to Hazen.

VALIDITY OF A DEED NOT TO TAKE EFFECT UNTIL THE DEATH OF THE GRANTOR.

The limitation of the operation of a deed till after the death of the grantor may be effected in two ways: 1st, by clearly expressing that intention in the instrument itself, as by the reservation of a life estate in the grantor, or by other apt forms of expression; and, 2d, by some act dehors the instrument, as by retaining it in the hands of the grantor, or by depositing it in the hands of a third party, with instructions not to deliver it till after the grantor's death.

I. It is scarcely necessary to cite cases to the effect that a deed reserving a life-estate to the grantor is valid, other things being equal; but its validity is not so clear when the intention so to reserve is not expressed in proper technical terms. A deed that, by its own

language, is limited to take effect after the death of the grantor, of necessity borders closely on the line of testamentary dispositions; and when once it crosses that line, however good it may be as a will, it can no longer be held valid *as a deed*: *Vreeland v. Vreeland* (N. J.), 21 Atl. Rep. 627. Whether the instrument is one thing or the other is a pure question of construction to be gathered only from its own terms. The form matters nothing. The true test is whether the estate granted is intended to pass to the grantor upon delivery, or not until after the death of the grantor.

(a.) In the first case, the instrument is a deed, reserving a life estate to the grantor by implication: *Carna v. Jones*, 5 Yerg. (Tenn.) 248; *Kimore v. Mustin*, 26 Ala.

309; *Golding v. Golding*, 24 Ala. 122; *Macumber v. Bralley*, 28 Conn. 445; *McGlawn v. McGlawn*, 17 Ga. 234; *Johnson v. Hines*, 31 Ga. 720; *Daniel v. Veal*, 32 Ga. 589; *Clayton v. Livermore*, 7 Ired. (N. C. L.) 92; *Wall v. Wall*, 30 Minn. 91; *Polk v. Varny*, 9 Rich. Eq. 303; *Williams v. Sullivan*, 10 Rich. Eq. 217. Though made in expectation of death: *Brown v. Atwater*, 25 Minn. 520. When the instrument contained the words, "give, grant and convey," in one clause, followed by "to have and to hold after my death," in the next, it was held a deed, not a will, on the ground that it was a grant of a present estate, the enjoyment of which was not to begin until the event specified should occur: *Johnson v. Hines*, *supra*. And so when the land was conveyed, "after my decease, and not before," these words were held to show merely that the use and enjoyment of the estate granted was postponed until that time: *Owen v. Williams*, 114 Ind. 179; S. C., 15 N. E. Rep. 678.

(b.) In the second case, where the estate does not pass *in presenti*, by the terms of the instrument, but only at the death of the grantor, it can operate only as a will, for a post mortem disposition of property cannot be made by deed; and must, of course, be executed with all the formalities of a will in order to be held valid: *Habergham v. Vincent*, 2 Vea. Jr.; on p. 231; *Wellborn v. Weaver*, 17 Ga. 267; *Carey v. Dennis*, 13 Md. 1; *Bigley v. Souvey*, 45 Mich. 370; S. C., 8 N. W. Rep. 98; *Sartor v. Sartor*, 39 Minn. 760; *Rose v. Quick*, 30 Pa. 225; *Frederick's App.*, 32 Pa. 338; *Frew v. Clarke*, 80 Pa. 170; *Carlton v. Cameron*, 34 Tex. 72; *Jones v. Loveless*, 99 Ind. 317. When a

grantor reserves to himself the use of all the property granted during his natural life, "then to go to the above named persons, and from thenceforth to be their property absolutely," the instrument is a testamentary paper, not a deed; *Symmes v. Arnold*, 10 Ga. 306; See *Cravy v. Rawlins*, 8 Ga. 450. And the words, "give and devise . . . the property I may die possessed of," make an instrument a will, though in the form of a deed. *Brewer v. Baxter*, 41 Ga. 212.

This distinction is one of great practical importance; for if the instrument is a deed, it is of course irrevocable when once delivered, and rights acquired under it cannot be affected, other things being equal, by subsequent conveyances, wills, or the rights of creditors; while, if it is a will, it is, of course, subject to all these. And it would seem that in some cases this very matter of the intervention of subsequently acquired rights has been an important factor in settling the question of the proper classification of the instrument: See *Jones v. Loveless*, 99 Ind. 317; *Owen v. Williams*, 114 Ind. 179; S. C., 15 N. E. Rep. 678.

II. When a deed, absolute in its terms, and containing no reservation of any estate in the grantor, is signed, sealed and acknowledged, but never delivered, and is retained in the possession of the grantor until his death, subsequent possession of it by the grantee can confer no title upon him, because it is void for want of delivery: *Cline v. Jones*, 111 Ill. 563; *Anderson v. Anderson* (Ind.), 24 N. E. Rep. 1036; *Miller v. Murfield*, (Iowa) 44 N. W. Rep. 540; *Martling v. Martling* (N. J.), 20 Atl. Rep. 41. And the fact of such re-

tention is strong *prima facie* evidence that the instrument was intended to operate as a will, not as a deed: *Schuffert v. Grote*, 88 Mich. 690; *Stilwell v. Hubbard*, 20 Wend. (N. Y.), 44. It would hardly be likely, however, that such a deed would be upheld as a will merely on the strength of this presumption. It is difficult to see what principle could be invoked to support such a ruling. But, though the presumption is that a deed retained by the grantor in his possession has not been delivered, there may be facts connected with and qualifying that retention, which amount to a valid delivery, as when the deed has been recorded: *Glaze v. Ins. Co.*, 87 Mich. 349; *S. C.*, 49 N. W. Rep. 395; *Colee v. Colee*, 122 Ind. 109.

III. So far, the question of the validity of the deeds under consideration has been almost purely a question of construction, dependent upon the language of the instrument and its legal effect, the only question of fact being as to the delivery. But in the class of deeds we are now about to discuss the intention of the grantor, in the previous cases to be gathered from the instrument itself, and so a question of law, becomes also a question of fact to be decided from the circumstances attendant upon the execution and delivery of the deed. These deeds are those which, though absolute in form, are delivered to a third person, with the understanding that they are not to be delivered to the grantee until the death of the grantor, thus virtually securing a life estate to the latter.

The first question is, of course, whether such a delivery is sufficient

to pass the title to the grantee. It is beyond controversy that delivery need not be made to the grantee in a deed personally; it may be made to another for his use, and it makes no difference when he receives the deed: *Sneathen v. Sneathen*, 104 Mo. 201; or, for that matter, whether he receives it at all. The title passes with the delivery to the depositary, unless the grantor retains some power of control or revocation, in which case there is no delivery: *Duer v. James*, 42 Md. 492; *Bovee v. Hinde*, 135 Ill. 137. The delivery, then, is sufficient, unless the instrument is to be considered as testamentary. But we have already seen that a mere postponement of the enjoyment of an estate granted will not make the instrument conveying it a testamentary paper: See cases cited *ante*, I (a). The whole question, then, resolves itself into this: Did the grantor intend to convey a present estate to the grantee, merely postponing his enjoyment of it until his death, or did he intend the estate to vest only upon that event?

There are two classes of deeds, to which these bear a close resemblance:—escrows, and deeds to be delivered on the happening of some future event. But there is a clear distinction between the two. An escrow, the second delivery of which is dependent upon the performance of a condition, of necessity can vest no estate until the performance of that condition; and the title, therefore, passes only upon the second delivery, that from the depositary to the grantee, except in rare cases, where the rights of third parties have intervened, or the grantor has done some act which would defeat the

estate granted, if the strict rule were adhered to; and in which the title is accordingly held to vest by relation to the first delivery: *Price v. Pitts*, Ft. Wayne & Chic. R. R. Co., 34 Ill. 13; *Shirley v. Ayres*, 14 Ohio, 307. But when the final delivery of a deed only awaits the lapse of time, or some contingency, as, for example, when the grantee shall come to town, the title is held to vest in the grantee upon the delivery to the depository, and the latter is only a trustee of the deed for the benefit of the grantee: 13 Vin. Abr. tit., *Faits or Deeds*, p. 23, pl. 9; *Bryan v. Wash*, 7 Ill. 357; *Cook v. Hendricks*, 4 T. B. Monroe (Ky.), 500; *contra*, *Demeney v. Gravelin*, 56 Ill. 93.

The class of deeds under consideration can hardly be properly classed with escrows, though this has sometimes been done; for there is, in these, no condition to be performed by the grantee. And further, if they are so classed, it would be difficult to find any principle upon which they could be held valid; for the title to the estate conveyed by an escrow dates only, as has been said, from the second delivery, except when there are circumstances that would render the strict application of the rule inequitable. Applying this rule, where no rights of third parties had intervened, the title conveyed by deeds of this class would vest only after the death of the grantor, and that would make them operative only as testamentary dispositions. Even when the rights of third parties had intervened, there would be no true equity in following the rule as to escrows, for as these deeds are almost always purely voluntary, the grantee can have no superior equity against in-

tervening rights. But, on the other hand, these deeds present an almost perfect analogy with deeds to be delivered on the happening of some future event, both in their nature and their operation; and should be preferably classed with them.

Accordingly, it is the general doctrine that when a deed, absolute on its face, is delivered to a third party, to be by him delivered to the grantee after the death of the grantor, the delivery is absolute, if the grantor retains no control or dominion over the deed in the hands of the depository; the effect of the conveyance is to vest the estate in the grantee, subject to a life estate in the grantor; the depository becomes a trustee of the deed for the grantee; and the delivery of the deed by him, in pursuance of the grantor's instruction, is, to all intents and purposes, as valid as if made by the grantor during his life: *Doe v. Bennett*, 8 C. & P. 124; *McCalla v. Bane*, 45 Fed. Rep. 828; *Stewart v. Stewart*, 5 Conn. 317; *Hockett v. Jones*, 70 Ind. 227; *Squires v. Summers*, 85 Ind. 252; *Smiley v. Smiley*, 114 Ind. 258; *Goodpaster v. Leathers*, 123 Ind. 121; *Hinson v. Bailey* (Iowa), 35 N. W. Rep. 626; *Wheelwright v. Wheelwright*, 2 Mass. 447; *Foster v. Mansfield*, 3 Metc. (Mass.) 412; *O'Kelly v. O'Kelly*, 8 Metc. (Mass.) 436, 439; *Hatch v. Hatch*, 9 Mass. 307; *Latham v. Udell*, 38 Mich. 238; *Williams v. Latham* (Mo.), 20 S. W. Rep., 99; *Parker v. Dustin*, 2 Fost. (N. H.) 424; *Hathaway v. Payne*, 34 N. Y. 92; *Diefsendorf v. Diefsendorf*, 8 N. Y. Suppl. 617; *Craik v. Wright*, 114 N. Y. 307; *Crooks v. Crooks*, 34 Ohio St. 610; *Ball v. Foreman*,

37 Ohio St. 132; Geisinger's Est., 11 Pa. C. C. R. 168; Stephens v. Huss, 54 Pa. 20; Stephens v. Rinehart, 72 Pa. 434; Albright v. Albright (Wis.), 36 N. W. Rep. 254; Bury v. Young (Cal.), the principal case, 33 Pac. Rep. 338. But see Stone v. Duvall, 77 Ill. 478. Even if the depositary deliver the deed to the grantee before the death of the grantor, in breach of his trust, the delivery will be good to vest the estate at the death of the grantor: Wallace v. Harris, 32 Mich. 380. But he will not be allowed to oust or disturb the latter during his lifetime: Alsop v. Eckles, 81 Ill. 424. The rights of third persons, in the absence of fraud, will not be allowed to intervene: Smiley v. Smiley, 114 Ind. 258; *contra*, Davis v. Cross, 14 Lea (Tenn.), 637. And a conveyance of the estate, made by the grantor, before the death of the grantor, is sufficient to pass his title thereto: Tooley v. Dibble, 2 Hill (N. Y.), 641. When part of the land conveyed was taken by a railroad company subsequent to the delivery of the deed to the depositary, the damages therefor were held to go to the grantees of the estate, not to the executor of the grantor: Geisinger's Est., 11 Pa. C. C. R. 168.

If, however, the grantor manifest an intention that no present estate shall vest in the grantee, the delivery to the depositary is not a delivery to him, and his title can date only from the second delivery. In such a case, the depositary is the agent of the grantor, not of the grantee, and, his authority being revoked by the death of his principal, his delivery of the deed after the death of the latter, can vest no title in the grantee. Accordingly,

any retention of control or dominion over the deed in the hands of the depositary, which is acknowledged on all sides to show an intention that the estate shall not finally pass from the grantor at the time of the delivery to the depositary, will make the instrument a mere testamentary disposition, and therefore invalid as a deed: Wellborn v. Weaver, 17 Ga. 267; Stinson v. Anderson, 96 Ill. 373; Hale v. Joslin, 134 Mass. 310; Weisinger v. Cock, 67 Miss. 511; Baker v. Haskell, 47 N. H. 479; Prutsman v. Baker, 30 Wis. 644. The reservation of a right on the part of the grantor to withdraw the deed at any time before his death: Brown v. Brown, 66 Me. 316. The delivery to the depositary with instructions to deliver it to the grantee, "provided it is not previously recalled": Cook v. Brown, 34 N. H. 460. And directions as follows: "Take this deed and keep it. If I get well I will call for it. If I don't, give it to Billy (the grantee):" Williams v. Schatz, 42 Ohio St. 47, have been held to show such a retention of control as will render the deed nugatory.

As the grantor, in such a case, has the right to rescind or recall the deed at pleasure, the mere fact that the grantee gets possession of it and records it will not confer any title on him: Pennington v. Pennington, 75 Mich. 600.

A few old cases are in opposition to this rule, holding that when the deed is delivered to the depositary, subject to the grantor's control, the delivery by the former to the grantee after the death of the grantor will pass the title, if that right of control is never, in fact, exercised. But these rest upon very insufficient grounds, and can-

not prevail against the weight of authority cited above: See *Helden v. Carter*, 4 Day (Conn.), 66; *Shed v. Shed*, 3 N. H. 432 (expressly overruled in *Cook v. Brown*, 34 N. H. 460); *Morse v. Slason*, 13 Vt. 296.

Though such an instrument is not valid as a deed, it may, nevertheless, if executed with the proper formalities, as we have seen, be good as a will; but in that case will of course be subject to all rights of third persons that have intervened between the date of its delivery to the depositary and the death of the grantor: *Jones v. Loveless*, 99 Ind. 317.

It only remains to consider the manner in which such a deed, when valid, takes effect. A number, perhaps the majority of the cases, hold that it vests the title by relation to the first delivery. But there are a very respectable list of well-considered cases that hold that the title vests in the grantee immediately on the delivery to the depositary. This seems to be in every regard the better view. The cases that hold the title to vest by relation have undoubtedly been misled by the impression that these deeds were similar to an escrow, an impression that we have seen to be without foundation. The doctrine of relation is even in the case of an escrow only permitted to defeat intervening rights; and that would be a poor excuse in the case of a voluntary deed. Further, the first delivery in case of an escrow is conditional, and cannot vest title except by relation; while in the cases under consideration, the first

delivery *must* be absolute in order to vest any title, by the second delivery, and if so, what is to prevent its vesting the title of itself, without regard to the second? On every ground, then, the latter doctrine is more consonant with reason, principle and justice.

To sum up the results of the preceding discussion: 1. Any deed, which purports to convey a present estate, even though that estate is not to be enjoyed until the death of the grantor, is valid as a deed, unless never delivered, either to the grantee or some person for him. 2. A deed, delivered to a third person with instructions not to deliver it to the grantee till after the death of the grantor, is valid as a deed, if that delivery be absolute; and vests a present estate in the grantee, the depositary being a trustee of the deed for him; but is of no effect as such, if the delivery is made subject to the subsequent control or dominion of the grantor. 3. Any instrument, evincing an intention to make a post-mortem disposition of property, though nugatory as a deed, will be valid as a testamentary paper, if executed with the requisite formalities of a will. 4. But a deed, purporting to convey a present interest, which is never delivered, but simply retained in the possession of the grantor till his death, whatever may be presumed to have been his intention in so retaining it, will be of no effect, either as a deed or as a will, unless there is some direct proof that it was intended to operate as the latter.

R. D. S.

NOTES AND COMMENTS ON RECENT DECISIONS.

INJUNCTIONS TO RESTRAIN STRIKES AGAIN.

In the January number, page 81, we took occasion to criticise the action of the Circuit Court for the Eastern District of Wisconsin, Judge Jenkins, for issuing an order which prohibited the employes of a road in the hands of a receiver from going on a strike. Not having an exact copy of the injunction before us, we were obliged to rely on other information as to the nature of the injunction. As part of this information necessarily came through the newspapers, we designated the source of information, generally, as newspaper reports. Some of our subscribers, who evidently do not agree with us in our strictures on the injunction, have criticised us for relying on such meagre authority. We beg to state, however, that we took every means in our power to verify the correctness of our statement as to the nature of the injunction. We said that its practical effect was to order men to continue to work. To show that this was no exaggeration, and also on account of the great importance of the injunction, we here print one of them in full:

"Whereas, it has been represented to the United States Circuit Court for the Eastern District of Wisconsin, on the part of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, as by their certain verified petition filed in said cause on December 18, 1893, and by their supplemental petition filed in said cause on December 22, 1893, and that said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, ought to be relieved touching the matters in said petitions more particularly described;

"And whereas, the United States Circuit Court for the Eastern District of Wisconsin, in a certain cause there pending, in which the Farmers' Loan & Trust Company is

the complainant, and the Northern Pacific Railroad Company, Philip B. Winston, William C. Sheldon, George R. Sheldon, William S. P. Prentice and William C. Sheldon and Thomas F. Oakes and Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, are defendants, did make orders directing that the writ of injunction issue as prayed for in said petition and supplemental petition of said receivers;

"Now, therefore, in consideration thereof, and of the matters in said petition set forth, you, the above named and the officers, agents and employes of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and each and every one of you, and all persons, associations and combinations, voluntary or otherwise, whether employes of said receivers or not, and all persons generally, and each and every one of you, in the penalty which may ensue, are hereby strictly charged and commanded that you, and each and every of you, do absolutely desist and refrain from disabling or rendering in any wise unfit for convenient and immediate use any engines, cars or other property of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers for the Northern Pacific Railroad Company, and from interfering in any manner with the possession of locomotives, cars or property of the said receivers or in their custody, and from interfering in any manner, by force, threats or otherwise, with men who desire to continue in the service of the said receivers, and from interfering in any manner, by force, threats or otherwise, with men employed by the said receivers to take the place of those who quit the service of said receivers, or from interfering with or obstructing in any wise the operation of the railroad or any portion thereof, or the running of engines and trains thereon and thereover, as usual, and from any interference with the telegraph lines of said receivers or along the lines of railways

operated by said receivers, or the operation thereof, and from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property or to prevent or hinder the operation of said railroad, and generally from interfering with the officers and agents of said receivers or their employes, in any manner, by actual violence or by intimidation, threats or otherwise, in the full and complete possession and management of the said railroad, and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the said receivers, whether belonging to the receivers or shippers, or other owners, and from interfering, intimidating, or otherwise injuring or inconveniencing or delaying, the passengers being transported, or about to be transported, over the railway of said receivers, or any portion thereof by said receivers, or by interfering in any manner, by actual violence or threats, or otherwise preventing or attempting to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by said receivers, and from combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers of any so-called labor organization, with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, and from ordering, recommending, approving or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time, and from ordering, recommending, advising or approving, by communication, or instruction, or otherwise, the employes of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending or advising any committee or committees, or class or classes of employes of said receivers, to strike or join in a strike, on January 1, 1894, or at any other time until the further order of this Court."

(Signed)

EDWARD KURTZ, Clerk.

If the words printed in italics in the above injunction do not prevent the employes from leaving the employ of the receiver, and practically, in effect, to keep them at work under the present wages and conditions, we are unable to read the English language.

We have said all that we care to say on this subject from a legal point of view in the January number above referred to. We hope, however, to be able, in the March number of the Magazine, to print a defence of the action of the Court by an eminent lawyer, whose belief that the injunction is sound is as strong as ours is that it is not.

W. D. L.

EXECUTOR'S POWERS TO TRANSFER SHARES.

The decision in *Livzey v. The Northern Pacific Railroad*, 33 W.N.C. 126 (Pa.), deserves notice. It opens a running sore that we all thought had been healed.

It rules that an executor cannot transfer personal property of the testator after six years from the death without a decree. It evidently assumes that if the will creates a trust the executor is not only converted into a trustee, not merely as between himself and the *cestui que trust*, which is true after administration is completed, though not till then (6 Madd. 13), or when he assents to the legacy (42 Ch. Div. 302), but also that a trust arises without any act to ascertain that the duties of administration are completed, and the title to the property as trustee is ascertained, which it is submitted, is a very serious mistake. Evidently, no distinction between these very different things is noticed in the case.

The point deserving of notice *on this point of law* is the tendency to ignore well settled rules and avoid decisions without even a remark so that the profession is left in doubt whether the rules and decisions were unknown or are intentionally overruled.

In 1796, the very case, *identical* in every material fact, was before Lord Eldon, in *Hartga v. The Bank of England*,

3 Ves. 33, the material fact being far stronger, however, in favor of the present contention.

In the judgment under consideration, it is said after six years there could be no occasion for a transfer by the executor. In that case the testatrix died in 1778, and the question was whether the bank could, in 1793, fifteen years afterwards, demand evidence of the right of an executor to transfer, or be called to account for having allowed a transfer, the stock being specifically devised in trust and there being in fact no dispute about the trust.

All the arguments presented in *Livezey v. The Railroad* were there presented and a good many more. The decision was that the bank had no business to inquire why an executor transferred stock. That the fact that it was given in trust had nothing whatever to do with the question. The judgment well deserves reading. It has never been questioned by any one, who was aware of its existence, and it never could be questioned by any one who understands what an executor is, as to the outside world. The reasons are unanswerable and the rule has remained to this day.

But it may be said, all this amounts to nothing, for there is no reason why we should not have the right to make new law for ourselves. But (1) it is not pretended and it could not be that there has been any legislation. (2) It is not pretended that there has been any judicial recognition of any change in the law or any divergence between the system of our ancestors and ours. On the contrary, in the very judgment from which there is a long quotation, the purpose of which it is difficult, if not impossible, to see there is a most emphatic endorsement of the law as laid down in *Hartga v. The Bank*, and a flat contradiction of the law as now stated. Whether the case was unknown or unread may be debated. But one would think that such a passage as this would induce inquiry in one citing an authority for the point, that a transfer clerk is liable for permitting a transfer of shares by an executor, on reading, that it is *undoubted law that he is not*. The material passage which is *not* quoted is this:

"The law casts the legal ownership of personal property of

"a deceased intestate upon his administrators. They are "sometimes said to be trustees, but they are such for administration. Their primary duty always is to dispose of the "personal property, and therewith pay the debts of the intestate "and make distribution amongst his next of kin. A sale and "transfer of stocks by them is therefore in the line of their "duty. There is no *cestui que trust* having a right to interfere "and prevent such a transfer. Hence, letters of administration are always sufficient evidence of authority . . . and so, "generally does an executor. His primary duty is administration. He is to pay debts and legacies out of the personal "estate, and use even specific legacies to pay debts if "necessary. His letters testamentary, therefore, show an "apparent right to dispose of the stocks of the testator; even "if the stock has been bequeathed specifically, a transfer agent "has no means of ascertaining whether it is needed to pay "debts. He can inquire only of the executor, the very person "who proposes to make the transfer. If he inquire of the "specific legatee he can learn nothing, for the legatee may be "ignorant, and to require evidence of authority beyond the "letters testamentary might greatly delay and embarrass the "executor in the discharge of his duties. It has, therefore, "generally been held that transfer agents may safely permit a "transfer of stock by an executor without looking for his "authority beyond his letters. Such was the ruling in *Hartga v. The Bank of England*, 3 Ves. 55; *Bank of England v. Parsons*, 5 id. 665; *Same v. Same*, 15 id. 569; *Franklin v. The Bank*, 9 B. & C. 156; *Fowler v. Churchill*, and *Churchill v. The Bank*, 11 M. & W. 323; and *Bank v. Franklin*, 1 Russell Ch. 575." Similar decisions have been made in this country, *and so far the law is undoubted.*

The apparent forgetfulness of the Act of 1874, intended to protect transfer agents, induced an examination of the paper book. And who would suspect from the judgment that the Court was not dealing with a case with which the law of Pennsylvania had nothing to do. And this explains the palpable contradiction between this case and that of *Fitzmeyer v. Shannon*.

The citation of *Chew v. The Bank*, is an odd one and induces the suspicion it was at second hand. No point was there raised as to the power of an executor to transfer, and it is for this it is cited. It was, did the consent of one known to be an idiot, and so found, warrant a transfer of his (the idiot's property) by an executor to himself?

But the purpose of this paper is simply to show that a considerable decision has been so cited as to make it appear to be the exact reverse of what it was, and that this has opened the flood gates of litigation about a question so simple as the right of executors and administrators to transfer stock, and of the duty of transfer clerks to sit as Chancellors, but always *ex parte*, and at the risk of their employers on that question.

R. C. McM.

SOME EQUITY CASES.

There have been some recent decisions in the department of equity which possess more than a passing interest, though it would be entirely too much to say that they are in any way remarkable. The peculiar characteristic of equity jurisprudence, it must be remembered, is its creative faculty and, as has been well said by an eminent jurist, "if we want to know what the rules of equity are we must look, of course, rather to the more modern than to the more ancient cases." And the equity lawyer must, therefore, not only read the current decisions in his branch of jurisprudence, but should also examine them closely, for its progressiveness is generally written in minute characters which are undecipherable, if once the sequence is broken.

It is proposed, therefore, to illustrate the different principles of equity by the citation of selected cases with a short discussion whenever a particular case seems to require more than ordinary attention.

Resulting Trusts.

Where one agrees to buy and hold certain real estate for the joint benefit of himself and another, and does in fact purchase it, a resulting trust arises which is not within the

statute of frauds; and which may be established by the evidence of the *cestui que trust* and by the admission of the trustee that he originally intended to buy for their joint benefit. And, in this case, the effect of this admission was not affected by the fact that it included a statement by the purchaser that he changed his mind before he bought the property, inasmuch as it appeared that he did not notify the *cestui que trust* of his changed intention: *Towle v. Wadsworth* (Ill. Sup. Ct.), 35 N. E. Rep. 73.

This decision was on a rehearing of the case and overrules the decision of *MAGRUDER, C. J.*, reported in 30 N. E. Rep. 602. The latter decision was based upon the Court's view that the evidence to establish the alleged loan was not full and satisfactory enough, a view which *BAILEY, C. J.*, on the rehearing considered erroneous. The principle, however, is a familiar one: See *Kimmel v. Smith*, 117 Pa. 192 (1887), and *Hackney v. Butt*, 41 Ark. 393.

Trustees.

The obligation of each co-trustee to see that the duty of their office is properly discharged is well shown in the case of *Purdy v. Lynch*, 25 N. Y. Sup. 585. Certain land was conveyed in trust to three trustees to sell for the payment of debts and to reconvey the surplus to the grantor. Two of the trustees practically turned over the proceeds of the sale to their associate to pay off the debts, and he misapplied the funds. The Court held that the others were liable for a breach of duty for failing to attend to it, that he applied the money as provided for in the trust agreement.

Jurisdiction.

The case of *Enslin et al. v. Wheeler* (Sup. Ct., Ala.), 13 So. Rep. 473, illustrates the scope of the general jurisdiction of equity jurisprudence. From the facts it appeared that a judgment had been rendered against a decedent in his lifetime, which, by the provisions of the code, became a lien upon his estate for a certain period after his death. But, through delay in issuing execution, the creditor found himself without any

statutory remedy for the enforcement of his lien. Upon application to a court of equity, however, the required relief was granted. After stating that there was no original jurisdiction in courts of law to enforce liens, the Court proceeded, "in the absence of statutory provisions conferring the remedy upon a court of law to enforce a lien created by the statute—and no other mode is provided by statute—a court of equity by virtue of its general jurisdiction over liens and trusts will take jurisdiction and enforce the lien."

Injunctions.

The power of a court of equity to enjoin the breach of negative covenants where *expressed* in a contract has been unquestioned since the decision in *Lumley v. Wagner*. But cases are continually arising where the contracts call for personal services and there is no covenant *not* to perform them for others, and the courts have enforced such contracts by injunction, on the ground that the services are special and unique. It is probable that the current of decision in this country will ultimately set that way. In a recent case in Georgia it appeared that an insurance agent had assigned to a firm his interest in a contract of agency, and had covenanted to remain with the firm as special agent, in a named State, for one year, and to give his entire time and attention to soliciting business for that company. He began soliciting business for a rival company and his covenantee endeavored to enjoin him from so doing. The Court was of opinion, however, that it could not grant the relief prayed for, since there was no express negative covenant in the assignment, and it did not appear that the defendant was an *especially skillful, successful or expert agent*, whose place could not be readily and adequately supplied by another: *Burney v. Ryle*, 17 S. E. Rep. 986.

See, on this point, *Metropolitan Exhibition Co. v. Ward*, 24 Abb. N. C. 393.

R. F. BRADFORD.

SOME CASES ON TORTS.

Two cases recently decided in the Supreme Court of

Pennsylvania will serve to show the limits there set to the master's duty to instruct his servants in the management of novel machinery and implements, and to inform them of a danger necessarily connected therewith, which is unknown to such servants.

In *Lebbening v. Struthers, Wills & Co.*, 157 Pa. 312. The company was held responsible for an injury to one servant, resulting from the unskilfulness and neglect of a fellow servant, who was engaged with him in the management of a piece of machinery, whose nature and character had not been sufficiently pointed out to them by the foreman in control of their work. Both workmen were unacquainted with the manner of working the machine. It was there stated to be the positive duty of the master, before putting an inexperienced employé in charge of dangerous machinery, with the use of which he is unacquainted, to properly instruct and qualify him for such new service. If he does not do so himself he must remain responsible for the manner in which the person, to whom he has delegated the work of instruction, performs it. The master can not clear himself by showing that he selected for the performance of his duty a person, to the best of his knowledge, competent and trustworthy. To this extent the subordinate is the "vice-principal." In this case it will be noted that the person injured was not injured solely by the danger inherent in the nature of the machine of which he was unwarned, but by that combined with the unskillfulness of a fellow workman, produced by the lack of that instruction, which it was the master's duty to give him, not only for his own safety but for that of all those who might be harmed by his lack of skill.

This duty to warn workmen of danger and instruct them in the management of their machines only extend to those who obviously lack experience. Thus, in *Burrows v. Pa. & N. Y. Canal and R. R. Co.*, 157 Pa. 51, decided just before the above case, it was held that, where the railroad allowed the engines of another road to run upon their line, they were not bound to warn such of their own engineers as might be put in charge of those engines of the somewhat greater width, which,

taken in connection with the width of the bridges, etc., on the line, might be a source of danger, inasmuch as he was an experienced engineer and more likely to know of the dangerous nature of the route than any other employé of the company. The former case shows the true meaning of the term vice-principle, when used in the Pennsylvania cases. It means one to whom the master has delegated the performance of some positive duty laid by the law upon him, and for the proper performance of which he is answerable just as much when he so delegates it as when he undertakes its performance himself. In sharp contrast to this meaning of vice-principal is that adopted by the Supreme Court of Washington, which is applied in the recent case of *Morgan v. Carbon Hill Coal Co.*, 34 Pac. Rep. 152, in which following the federal decisions (*R. v. Ross*, 112 U. S. 377, etc.), it was said, that test as to whether one employé was a fellow servant of another or a vice-principal for whose conduct the master was responsible, depended upon whether or not the one servant had the power of control over the other. There, it was held that a fire boss, who had only the power to order the miners from one place to another, was not vice-principal but a fellow servant with a miner who was injured by the fire boss' negligence in lighting his pipe where there was fire damp, and so causing an explosion. He had no control over their work or their manner of conducting it. Had, however, the injury resulted from the act of the fire boss in ordering the miners into a place of danger the company would be liable. Where a limited power of control is given the company is only liable for a misuse of that power. Where authority over workmen is conferred by the master he must be liable for the mode in which it is exercised. Such is the definition of vice-principal in that case. The distinction between the two meanings is clear, the one describes a subordinate in what so ever grade of service to whom is delegated the performance of some positive duty which the master, at his hazzard, is bound to see performed, the other one to whom the master has given authority to control the movement and actions and work of other employés.

The Supreme Court of Pennsylvania, in the recent case of *In re Coleman's Estate*, 28 At. Rep. 137, has consistently carried out the principle of the decision in *Miller's Ap.*, 111 Pa. 321, recognizing the liability of foreign real estate owned by a Pennsylvania testator, to the collateral inheritance tax law, where the owner has, by his will, effected an equitable conversion with respect to such real estate. In *Coleman's Estate* the converse of this question was presented. A non-resident testator directed his executor to sell certain real estate, situate in Pennsylvania, covert the same into money and pay certain legacies to collaterals. It was held that the assessment of the land, as land, for the payment of the collateral inheritance tax was void, inasmuch as the testator willed only the *proceeds* of a sale of such lands to collaterals.

In former pages we have called attention to some peculiarities of this branch of our collateral inheritance tax law. Thus, in *Miller's Appeal*, the tax was imposed upon a fund arising from the sale of foreign real estate, owned by a domestic testator, with respect to which he had effected an equitable conversion. "As the order to sell was imperative and absolute," said the court, "and worked a conversion . . . we "have no choice to regard it as other than personalty. As "such it must be regarded as passing by the law of the "domicile."

In commenting upon this decision, it was observed that the notion that real estate and everything pertaining to its devolution, transmission and tenure was governed and controlled by the *lex rei sitæ* had been settled by a long line of authorities: *Bigelow's Story's Conf. of Laws* (8th Ed.). To charge the succession of foreign real estate with the payment of the collateral inheritance tax is inconsistent with the spirit of such taxation. Land situate abroad and devised by a domestic will, does not devolve by force of the will nor of the domestic law, but by permission of the State where the land is situate; and, not depending upon the domestic law, cannot legally nor in good conscience be asked to pay the price of succession: *In re Swift's Estate*, 32 N. E. Rep. 1096; 32 Am. L. R. and Rev. 367; *Bittinger's Appeal*, 129 Pa. 338.

In the opinion of the Orphans' Court in *Coleman's Estate* we have the following explanation of *Small's Appeal*, 151 Pa. 1: "The bequest was specifically of testator's (who was domiciled in Maryland) interest, including 'all the property, real and personal, notes, stocks, bonds, and accounts,' in a limited partnership organized under the laws, and having its principal place of business in this State. The value of the property depended largely upon its continuance here. There was no reason for its conversion and transmission to the testator's domicile, and it was given to the surviving partners as such in specie. The facts plainly made an exception to the general rule. The actual situs was here, and liability to the tax followed. It is urged upon behalf of the commonwealth that this case rules the present. But the facts differ in material respects. The gift here was of an interest in a fund whose distribution belonged to the domicile of the donor. It was said in *Re Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132, that the collateral inheritance tax was not a succession, but a direct tax upon the 'thing' given in the hands of the donees. What was the 'thing' given to these legatees? The answer is in *Miller v. Com.*, 111 Pa. 321; 2 Atl. 492, in which it was held that, where a testator, domiciled in this State, orders land, situated without, to be sold to pay pecuniary legacies, these legacies will pass to the legatees as money, subject to the domiciliary law, and, consequently, to the collateral inheritance tax. 'Under all the decisions it cannot be questioned,' said the court, 'that the third clause of [sale under the] will operated a conversion of the residuary real estate into personalty, efficacious from the moment of testator's death.'

These cases, certainly, appear remarkable from the writer's stand point. A fiction of equity, which, for the purpose of better effecting the intention of a testator, regards land as personalty and personalty as land, seems capable of bringing Pennsylvania real estate into New Jersey, and *vice versa*, for the purpose of taxation.

JOHN A. MCCARTHY.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to William Draper Lewis, Esq., 728 Drexel Building, Philadelphia, Pa.]

A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, Adapted to the Laws of the Various States with an Appendix of Forms. By ALEX. M. MURRILL. Revised by JAMES L. BISHOP. Sixth Edition. Revised by JAMES AVERY WEBB. New York: Baker, Voorhis & Co., 1894.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by T. E. and E. E. BALLARD. Vol. II, 1893. Crawfordsville, Ind.: The Ballard Publishing Co., 1893.

A TREATISE ON THE LAW OF PARTNERSHIP. By THEOPHILUS PARSONS, LL.D. Fourth Edition. Revised and enlarged. Boston: Little, Brown & Co., 1893.

A TREATISE ON THE LAW OF LIENS, COMMON LAW, STATUTORY, EQUITABLE AND MARITIME. By LEONARD A. JONES. Second Edition. Revised and enlarged. Two volumes. Boston and New York: Houghton, Mifflin & Co., 1894.

A TREATISE ON THE LAW OF BUILDING AND BUILDINGS, especially referring to Building Contracts, Leases, Easements and Liens, containing also Various Forms Useful in Building Operations, a Glossary of Words and Terms commonly used by Builders and Artisans, and a Digest of the Leading Decisions on Building Contracts and Leases in the United States. By A. FARLETT LLOYD. Second Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY. By LEONARD A. JONES. Fourth Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

FORMS IN CONVEYANCING AND GENERAL LEGAL FORMS, comprising Precedents for Ordinary Use, and Clauses Adapted to Special and Unusual Cases. With practical notes. By LEONARD A. JONES. Fourth Edition. Revised, with appendix containing recent statutory changes. Boston and New York: Houghton, Mifflin & Co., 1894.

A TREATISE ON THE LAW OF QUASI-CONTRACTS. By WILLIAM A. KEEFER. New York: Baker, Voorhis & Co., 1893.

A TREATISE ON THE NEGLIGENCE OF MUNICIPAL CORPORATIONS. By D. A. JONES. New York: Baker, Voorhis & Co., 1892. (Reviewed in this number.)

SUNDAY—LEGAL ASPECTS OF THE FIRST DAY OF THE WEEK. By JAMES T. RINGGOLD. Jersey City, N. J.: Fred. D. Linn & Co., 1891.

THE LAW OF PUBLIC HEALTH AND SAFETY AND THE POWERS AND DUTIES OF BOARDS OF HEALTH. By LEROY PARKER and ROBERT H. WORTHINGTON. Albany, N. Y.: Matthew Bender, 1892. (Reviewed in this number.)

OPINIONS OF MR. JUSTICE HARLAN AT THE CONFERENCE IN PARIS OF THE BEHRING SEA TRIBUNAL OF ARBITRATION, CONSTITUTED BY THE TREATY OF FEBRUARY 29, 1892, BETWEEN HER BRITANNIC MAJESTY AND THE UNITED STATES OF AMERICA. Washington, D. C.: Government Printing Office, 1893.

INTERNATIONAL JOURNAL OF ETHICS, Devoted to the Advancement of Ethical Knowledge and Practice. January, 1894. Managing Editor, S. BURNS WESTON, Philadelphia. (Reviewed in this number.)

A PRACTICAL TREATISE ON NERVOUS EXHAUSTION (Neurasthenia). By GEORGE M. BEARD. Edited, with notes and additions, by A. D. ROCKWELL. Third Edition. New York: E. B. Treat, 1894.

HOW TO USE THE FORCEPS. By H. G. LANDIS and CHAS. H. BUSHONG. Illustrated. New York: E. B. Treat, 1894.

SYPHILIS IN THE INNOCENT (Syphilis Infantum). Clinically and Historically considered, with Plan for the Legal Control of the Disease. By D. DUNCAN BULKLEY, A.M., M.D. New York: Bailey & Fairchild, 1893.

REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE. A treatise adapted to use in all the States and Territories where that system prevails. By JOHN NORTON POMEROY, LL.D. Third Edition. Edited by JOHN NORTON POMEROY, JR., A.M. Boston: Little, Brown & Co., 1894.

TREATISE ON EXTRAORDINARY RELIEF, IN EQUITY AND AT LAW. By THOMAS CARL SPELLING. Covering Injunction, Habeas Corpus, Mandamus, Prohibition, Quo Warranto, Certiorari. Containing an exposition of the principles governing these several forms of relief, and of their practical use, with citations of all the authorities up to date. Two volumes, 8vo. Boston: Little, Brown & Co.

AMERICAN RAILROAD AND CORPORATION REPORTS, being a Collection of the Current Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago: E. B. Myers & Co., 1893.

A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY. By EDWARD C. MANN, M.D. Albany, N. Y.: Matthew Bender, Law Book Publisher, 1893. (Reviewed in this number.)

BOOK REVIEWS.

GENERAL DIGEST OF THE DECISIONS OF THE PRINCIPAL COURTS IN THE UNITED STATES, ENGLAND AND CANADA: REFERS TO ALL REPORTS, OFFICIAL AND UNOFFICIAL, FIRST PUBLISHED DURING THE YEAR ENDING SEPTEMBER, 1893. Annual. Being Vol. VIII, of the Series. Prepared and Published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y., 1893.

So far as we have been able to test this work, we find that the citations are correct and the statements of the principles of law clear. It is not a complete digest in the sense of containing every decision or every point involved in every decision, but it probably contains all the decisions that are worth anything and a good many more besides. The notes to principle cases, which are interspersed throughout the book, add value to the work, though we think they would be of more value if they related to the specific question involved in the cases digested, rather than to the general subject under which the cases fall. As, for instance, on page 240, § 3223, we read that "a verdict depending only on the determination of the question, whether or not defendants signed a written contract justifiably relying upon the representations of plaintiff's agent as to its contents, and whether or not such representations are false, will not be disturbed on appeal where there is evidence to support it." The note to this case is "A verdict that a marriage be dissolved because entered into under duress and fraudulent conspiracy, which does not appear full and satisfactory to the reviewing court, will be set aside, as the rule applicable in other civil actions, that a verdict, supported by some evidence, will not be disturbed, does not apply in divorce cases."

Now it is true that the note deals with the same general subject as the case, and yet we doubt if a person would cite one case in support of the other. He might be appealing a

divorce case or he might be appealing a case depending upon a contract of agency. If the first, he would probably know of the decision, the case given not being a recent one. If it was the contract of agency which was involved in his case, the divorce case would do him no good. While, therefore, these notes are of considerable value, and are evidently done with great care, it is a question whether they are as valuable as they might be made, or worth the space which they take in the work.

The printing throughout is good and the arrangement of the whole convenient and satisfactory. W. D. L.

A TREATISE ON TRUSTS AND MONOPOLIES, CONTAINING AN EXPOSITION OF THE RULE OF PUBLIC POLICY AGAINST CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE, AND A REVIEW OF THE CASES, ANCIENT AND MODERN. By THOMAS CARL SPELLING, of the San Francisco Bar. Boston: Little, Brown & Co., 1893.

This book is a compact treatise of 274 pages, which comes forth boldly to clear a way through forests of perplexing decisions. We do not recollect a work which gives to the legal profession a more masterly, concise and satisfactory treatment of the whole subject of trusts and monopolies than that of Mr. SPELLING. The author seems to be thoroughly competent to discuss the intricate problems which abound in this branch of the law and to deal intelligently with broad questions of public policy.

This book is of great practical value, for the author has not yielded to the temptation (which, in the discussion of such a theme, must have continually assailed him) of indulging in abstract theories or intellectual vagaries upon problems yet unsolved. In a work of this sort it is, of course, necessary to expand the fundamental principles by the narration of facts of particular cases, and we feel justified in admiring the succinct and clear manner in which the cases have been placed before us. Chapter I contains an interesting historical condensation of the principles governing the subject, and, as an introduction

to the real theme of the book, the author devotes three chapters to the discussion of the kindred doctrines of the legality of agreements not to practice professions or trades, engage in business or accept employment.

It is from the beginning of Chapter V that Mr. SPELLING treads an almost unbeaten path, applying in that chapter in an original manner an old principle to the modern methods of suppressing competition, known as "cornering markets" and "tying up stocks."

Chapter VI treats of combinations among artisans and workingmen—a timely discussion only, though a brief one.

Chapter VIII gives the application of the rule of public policy to contracts for the suppression of competition in public service, agreements, says the author, fraught with serious import to the community.

This is aptly followed up in the next chapter by a discussion upon municipal grants and privileges until, in Chapter XII, monopolies in the form of "trusts" are dealt with, succeeded by a history of anti-monopoly legislation in the United States,—a species of law-making, which the author laments as a futile and almost abortive attempt to curb the power of such combinations.

As a work of more than ordinary merit, Mr. SPELLING's book deserves a place upon the desk of every progressive lawyer.

A. D. L.

SHARP & ALLEMAN'S LAWYERS' AND BANKERS' DIRECTORY FOR 1894, JANUARY EDITION, PUBLISHED SEMI-ANNUALLY IN JANUARY AND JULY. Philadelphia: Sharp & Alleman, 1894.

The utility of this work, and the care with which it is prepared, are well known to the profession. The volume before us is divided into five parts: The first is a lawyer's directory, containing the names of over 7,500 lawyers throughout the United States and Canada and the principal cities of Europe. These lawyers, who have been, as far as we can ascertain, selected with a good deal of care, will

collect debts, etc., for the terms mentioned on one of the front pages of the book. Part two, is a full list of the banks and bankers, together with their capital, surplus and names of officers and correspondents. The list includes all the national, State, savings and private banks, safe deposit, trust and guarantee companies in the United States. Part three is a complete court calender giving the dates, times and places for holding all State and Federal Courts throughout the country. Part four is a synopsis arranged according to the laws of all the States and Territories relative to the collection of debts. Part five is a list of forms for the acknowledgment of deeds, affidavits for proving public accounts, and instructions for taking depositions in all the States and Territories. Part six is a "Telegraph Code," a system by which one can send a long message at very small cost. It is divided into three parts: Part one, being for the use of merchants and the commercial traveller. Part two, for the use of attorney and client. Part three, for general use.

This outline statement of what the work contains is sufficient to prove its value to the profession.

The value of all such publications depends upon the care and accuracy with which they are done. As we have said, so far as we have had occasion to use the directory, we have found it satisfactory.

W. D. L.

MANUEL FOR INSPECTORS OF ELECTION, POLL CLERKS, BALLOT CLERKS AND VOTERS OF THE STATE OF NEW YORK (EXCEPT IN THE CITIES OF NEW YORK AND BROOKLYN) FOR USE AT ELECTIONS AND ON REGISTRATION DAYS. Compiled from Existing Laws of the State of New York and the United States with Amendments to Date, with Notes, Forms and Instructions. By F. G. JEWETT. Albany: Matthew Bender, 1893.

This work, of course, is not useful outside of New York. For the voters in that State, who are afflicted with the caricature of a Ballot Reform Act, it must be very useful, as it contains the qualifications of election officers, registration

laws, forms of the ballot used, together with a synopsis of what is meant by citizenship. The index seems to be very complete.

W. D. L.

LAWYERS' REPORTS ANNOTATED. BOOKS XIX AND XX.
Rochester, N. Y.: The Lawyers' Co-operative Publishing
Company, 1893.

XIX and XX L. R. A., are lying upon the reviewer's table and have been subjected to a careful examination. The general plan of this excellent periodical is too well known to the profession to make necessary an extended comment in this place. Whether or not there is a real need for a periodical which, like the L. R. A., publishes not only annotations and a synopsis of the briefs of counsel, but also the full text of the decisions of the courts, is a question about which lawyers differ. In view of the admirable system of Reports of the West Publishing Company, it should seem that the L. R. A. would be more acceptable to the profession if the cases and opinions were summarized or digested, instead of being reported at length, and the periodical were to confine itself to the publication of briefs and annotations. Under present conditions no publication of selected cases can ever be what the L. R. A. claims to be, namely: "A complete working library of text work and reports." A lawyer, with an important brief to write, will look up the cases which he is citing and read the opinions, not resting satisfied with the summary statement of the decision as contained in an annotation or digest. He is accordingly saved but little trouble by the circumstance that one case out of, say, fifty cited is reported in full in the L. R. A.

However, this may be, the plan of the work is certainly well carried out. The cases are carefully selected; many of the briefs are extremely valuable and the annotations are often replete with learning and suggestion. In Book XIX the reader will find a valuable collection of authorities in the briefs of counsel in *Genet v. Delaware & Hudson Canal Co.*, an interesting decision by the New York Court of Appeals in regard to the effect of a mining lease containing stipulations

with respect to merchantable coal and the mining of a minimum number of tons. In the same volume *Kelly v. Nichols* (p. 413), a decision of the Supreme Court of Rhode Island, is of more than usual interest. It deals with the subject of trusts for charitable uses, and discusses, *inter alia*, whether a trust to repair the grave of the testator and to keep the testator's house open for the entertainment of ministers are or are not charitable uses.

In Book XX there are two interesting cases which deal with the *ultra vires* contracts of private corporations. The first is *Leinkauf v. Lombard* (p. 48; 137 N. Y. 417), in which the Court of Appeals of New York decide that a corporation cannot successfully set up the defence of *ultra vires* to avoid responsibility upon a contract growing out of a business in which it is actually engaged. The second case is *Miller v. American Mutual Accident Insurance Company* (p. 765), in which the Supreme Court of Tennessee seem to give their adherence to the older and less practical rule that a contract of a corporation in the exercise of its powers cannot be enforced merely because the corporation has received a benefit under it which, in fairness, it ought not to retain. To this latter case an annotation is appended, in the course of which the writer, "A. P. W.," examines a large number of decisions which bear upon the subject-matter of the principal case. The note is a valuable note, although, in so far as it treats of the English authorities, it is not an improvement upon POLLOCK's note upon the same subject in the appendix to his work on Contracts—a note, which, by the way, A. P. W. might have cited, as it seems not unlikely that he made use of it in preparing his annotation. The American cases upon *ultra vires* contracts are satisfactorily digested, but the order in which they are discussed seems to be neither the historical order nor an order founded upon an exhaustive analysis of the subject in hand. The collection, however, is upon the whole a valuable one, although it should have contained a statement of the decision of the Supreme Court of the United States in *Central Transportation Company v. Pullman Palace Car Company*, in 130 U. S. 24 (1890).

In the same volume is the case of *Saxton v. Webber*, decided by the Supreme Court of Wisconsin (p. 509; 83 Wis. 617). This case gives occasion to a useful annotation upon the effect upon prior takers of the failure of a gift because it violates the rule against perpetuities. A large number of authorities are classified and arranged under a series of propositions representing generalizations from the decisions. It must be observed, however, that an annotation upon such a subject, no matter how carefully it is prepared, furnishes a proof of the impossibility of carrying out the plan of the L. R. A. in its completeness. It is said that "the annotations are intended to furnish a reference to all former decisions on subjects discussed in the cases reported," but the reader of this annotation (if he happens to be especially familiar with the subject-matter of it) will notice that many important cases are not even cited. Thus, there is a failure to cite *Odell v. Odell* (10 Allen, 1), and *Martin v. Margham* (14 Sim., 230), in support of the proposition that "That annexation to a valid devise of an invalid direction as to accumulations of income will not of itself defeat the gift."

It is impossible to comment at length upon all the decisions and annotations contained in these two volumes which are worthy of remark, and the reviewer is constrained to dismiss them with the general comment that the books represent useful additions to the working library of the practitioner.

G. W. P.

THE RELATION OF ETHICS TO JURISPRUDENCE.

The current number of the "INTERNATIONAL JOURNAL OF ETHICS" cannot fail to attract the attention of members of the legal profession. Among the articles of interest are those on "The Social Ministry of Wealth," by Prof. HENRY C. ADAMS, of the University of Michigan; "State Creation of Old Age Distress in England," by Dr. M. J. FARRELLY, of London; and book reviews of WATT's "An Outline of Legal Philosophy," by SIDNEY BALL, of Oxford University, and of the Report of the New York State Reformatory, by ROLAND P. FALKNER, of the University of Pennsylvania.

Rev. JOHN GRIER HIBBEN, of Princeton College, contributes a scholarly paper on "The Relation of Ethics to Jurisprudence," which must command notice from all jurists and political philosophers. We think it was Sir Henry Sumner Maine, who somewhere said that "No man can hope to have clear ideas either of law or of jurisprudence who has not mastered the elementary analysis of legal conceptions effected by Bentham and Austin." Recognizing the importance of strict definition, and with a laudable desire to give every possible advantage to those whom he regards as his opponents in the argument, the author takes the definitions of jurisprudence and of ethics as framed by Holland in the spirit of the analytical jurists, and then proceeds to refute the propositions laid down by many learned writers as to the complete separation of these two sciences. Among the authors cited as insisting upon the complete separateness of the two spheres of ethics and jurisprudence is Matthew Arnold, in these words: "If it is sound English doctrine that all rights are created by law, and are based on expediency, and are alterable as the public advantage may require, certainly that orthodox doctrine is mine." Now Prof. Hibben himself insists that "the necessity of strict definition should be recognized by the moral philosopher," and we would respectfully submit that we should know in what sense Arnold uses the word "rights" before concluding that these words of his necessarily place him among those who insist upon the separation of ethics and jurisprudence. We confess, however, that the quotation awakened a curiosity as to the book of Arnold's in which it might be found, and, as the foot-note cited, not Arnold but William Samuel Lilly, we referred to that author's recent work "On Right and Wrong," and found that, although quoting Arnold in the exact words of Prof. Hibben's article, Lilly also fails to state where those words are to be found in Arnold's writings. This is most unsatisfying to any one wishing the best evidence on this point, and our dissatisfaction is increased when, continuing to read Lilly, we find these words: "The apostle of culture is here the mouthpiece of the vulgar belief, that material power, the force of numbers, furnishes the last reason

of things, and the sole organ of justice; a belief which finds practical expression in the political dogma that any 'damned error' becomes right, if a numerical majority of the male adult inhabitants in any country can be induced, by rhetoric and rigmarole, to bless it and approve it with their votes." Of all English philosophers, Matthew Arnold would be one of the last whom we should expect to be the proponent of any such doctrine as that. His lecture on "Numbers," delivered in this country only a few years ago—to cite no other work—would seem sufficient to justify a contrary conclusion. We do not say that Arnold did not hold that position. It may be that the words quoted in the article under review are to be found in some work of his with which we ought to be familiar, but we shall not be fully satisfied that he did until we read the words in his own writings and find their meaning in connection with their context. If, however, Prof. Hibben will pardon us for quoting (without giving the reference), words which we *think* are those of Maine, we shall be glad to pardon him for a like slip in reference to Arnold.

Having defined the spheres of the two sciences of jurisprudence and ethics, our author proceeds to consider the derivation of law, and criticises the analytical jurists because, after stating that all law proceeds from sovereignty, they fail to carry their investigation of origins beyond that point. That the genesis of law discloses natural limitations of sovereign power, ethical in their character, is maintained by Prof. Hibben, who, after indicating briefly the indirect and impalpable influence of ethical sentiment in creating, annulling and reforming law, considers what contribution to the solution of the problem has been made by "the vanishing point of jurisprudence"—international law. In this connection he quotes approvingly the position assumed before the Behring Sea Commission by Mr. James C. Carter that, where there are no treaty rights and no precedents, disputes between nations are often arbitrated by appeal to the principles of national equity. In opposition to this contention of the United States counsel was the proposition of England's counsel, Sir Charles Russell, who insisted that international law is for all practical

purposes a code, and ethics and equity have nothing to do with it. While we doubt whether our author can find much support for his view from the decision in the *Behring Sea* case, we are in thorough sympathy with him in his conclusion as to the influence of ethics on jurisprudence, and are glad he can say: "The time has come in the history of mankind when it is generally recognized that a State possesses certain moral responsibilities. There is a civic as well as an individual conscience"

G. G. M.

ELEMENTS OF ECCLESIASTICAL LAW. By the REV. S. B. SMITH, D.D. Vol. I. Ninth Edition. New York: Benziger Bros., 1893.

With the presence of the Papal Alegate among us, a popular interest has been aroused through discussions in the public prints, as to the nature and extent of the organization of the Roman Church. The perfect symmetry of this organization has been but little understood by us in America, simply because the American people at such a distance from Rome and under such different social conditions from those present when the Church was organized, have cared nothing or but very little, for its powers or rule. At this time, therefore, it is very fortunate to receive a new edition of Dr. Smith's work, stamped with the approval of many distinguished prelates of the United States, living and dead.

Dr. Smith divides his first volume, which treats entirely of Ecclesiastical Persons, into four parts: 1. The principles of the canon law with a discussion of the value and weight to be attached to the various sources of that law. 2. Treats of persons pertaining to the hierarchy; of ecclesiastical jurisdiction; how it is acquired, how exercised, and those who are subject to it. Chapters six and seven present to the reader an extremely interesting and accurate description of the mode of electing the Pope; and the succeeding pages of this part are devoted to a discussion of the rule regulating the appointment, the removal and qualifications for the lesser dignitaries of the church from cardinal to parish priest. 3. Treats of particular

instances of ecclesiastical jurisdiction wherein we find elaborately discussed such well-worn headings as the infallibility of the Pope: the relation of Church to State, etc. 4. Treats of the duties of those who are the legally constituted advisers of bishops in the government of the diocese in the United States.

That there is a necessity for a more popular understanding of this complex organization is evidenced by the fact that it required two solemn arguments before a full bench in the Supreme Court of Pennsylvania, to maintain the right of a bishop to remove a priest from the charge of a congregation without specifying the nature or the cause of the removal: *O'Hara v. Stack*, 90 Pa. 477; *Stack v. O'Hara*, 98 Pa. 213.

Of Dr. Smith's work enough praise cannot be bestowed upon it. The citations show profound study and research, and while feeling thankful that the conditions in this country, social and religious, do not require a universal knowledge of the refinements pertaining to the jurisdiction and power of the church, such as is necessary to the daily life upon the Continent, yet we cannot help pitying those whose attention is not drawn to Dr. Smith's book. Here and there throughout the work we find statements that remind us very forcibly of our own common law. Thus, in speaking of the rules for the interpretation and construction of canon laws, we find them classified into "1. Declaratory, *i. e.*, explanatory of the words of the law. 2. Corrective, that is favorably. 3. Restrictive—thus penal laws must be construed strictly. 4. Extensible, by which laws are extended to similar cases."

Through the work we find traces of the sources from which Blackstone and Kent derived many of their most subtle refinements. Much of that scholastic learning which influenced our own law is also to be found. Thus, in speaking of the qualifications required of persons who are to be promoted to ecclesiastical dignities and offices, we find this remarkable classification as to the degrees of learning. "A person may possess learning in three-fold degrees: 1. In an eminent degree, when without the aid of books he can readily explain even difficult questions. 2. In a middling degree, if, with the

aid of books and upon deliberation, he is able to clear up difficult questions. 3. In a sufficient degree, *i. e.*, in a manner that enables him to discharge the duties of his office."

While, as the author tells us in his preface, the work was designed for the use of students in the seminary, we can imagine no book more truly invaluable either to the churchman or the layman than Dr. Smith's, and cheerfully recommend it to the careful study of all those who desire to comprehend the principles, the policy and aim of the Roman Church.

J. A. McC.

THE LAW OF PUBLIC HEALTH AND SAFETY, AND THE POWERS AND DUTIES OF BOARDS OF HEALTH. By LEROY PARKER and ROBERT H. WORTHINGTON. Albany, N. Y.: Matthew Bender, 1892.

The scope of this book and its method of treatment, one of the authors having had a practical experience in one of the best State Boards of Health in the United States, are such as to commend it to the professions, both of law and medicine.

As a manual for health officers, in our opinion, it is invaluable.

Every physician in general practice is confronted at times with important questions involving the public health which must be answered promptly and accurately; and we know of no single book wherein he will find so safe a guide as in this book.

About 2500 cases are cited, and, so far as we can see with the limited time at our disposal, the work appears to have been carefully done. The book deserves a much more extended notice, but we can conscientiously commend it as a valuable addition to legal literature.

MARSHALL D. EWELL, M.D.

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A TREATISE ON THE NEGLIGENCE OF MUNICIPAL CORPORATIONS. By DWIGHT ORVEN JONES, author of "The Construction of Contracts." New York: Baker, Voorhis & Co., 1892.

A new work on the Law of Negligence is always acceptable. As long as courts of justice sit for the purpose of righting wrongs and settling disputes a large portion of the cases submitted for their decision will arise out of carelessness or neglect of some duty imposed which human fallibility will ever supply. A breach of individual duty is more readily detected and more quickly corrected than that of a powerful municipality, yet it is with instances of the latter that lawyers, especially city lawyers, have frequently to deal. It is only through an energetic and rigid application of the law on the part of the courts that municipal governments can be made to live up to the special duties which they owe the individuals who claim membership therein with all its accompanying responsibilities.

The initial chapter of Mr. Jones's book reviews briefly the "General principle of the Law of Negligence." The chapters succeeding treats the question of "Municipal Liability" from an historical point of view, and then proceed to show the distinction between the "Duties of a Solely Governmental Kind," and those of a "Solely Municipal Kind." The principal cases in which questions of negligence in municipalities are likely to arise then follow, such as "Highways," "Sidewalks," "Snow and Ice on Streets and Sidewalks," "Negligent Construction of Bridges and Failure to Repair," "Negligence in Making Public Improvements," and "Negligence in Connection with Municipal Ownership or Management of Property."

To the doctrine of "Respondent Superior," and the questions of "Notice," "Proximate Cause," "Contributory Negligence," and "Evidence," each, a chapter is devoted. The work concludes with a chapter on "Damages."

Negligence from a statutory point of view is carefully considered, especially as regards the construction and care of highways.

A large number of cases are cited, in which the author is to be commended for his discretion in selecting such parts of the court's opinion as sufficiently explain the facts, a particularly necessary thing to the proper understanding of the principle of law laid down in negligence cases.

The arrangement of the matter is admirable and an unusually elaborate index guides the reader to any looked for point.

The volume does credit to the publisher as well as to the author, being of convenient size, substantial binding and large clear type, with conspicuous headings.

W. S. E.

A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY.
By EDWARD C. MANN, M.D. Albany, N. Y.: Matthew
Bender, 1893.

The first thing that impressed us in opening this book was the peculiarity of its title, for we find in it chapters on "Personal Identity in Murder Cases," "Inhalation of Poisons," etc., the relation of which to the jurisprudence of insanity is somewhat difficult to see.

The book, in our opinion, shows evidence of insufficient study of the subjects discussed and is full of inaccuracies and loose statements.

To the lawyer we regard it as absolutely worthless, and the physician who relies upon its statements of alleged legal principles will have reason to regret it. It has no table of cases, which, perhaps, is unnecessary, for being struck by the worthlessness of the legal (?) principles stated, we consulted some of the authorities cited and found, as we supposed, they did not support the text.

As a sample of the lack of scientific classification of the work and the tendency of the writer to ramble, the reader is referred to page 24 in the chapter on "Morbid Sexual Perversions as related to Insanity," where the author describes the case of a patient suffering epileptic vertigo accompanying menstruation, with suicidal impulses, whom he described as refined and virtuous and apparently normal in every respect, after which he wanders into a wordy discussion of the right and wrong theory, closing with the admonition that "it is time for the medical profession to come to the point and voice science in this matter, etc." The author seems not to know that there

is a work entitled "Psyncopathia Sexualis" by Kroft-Elming, and the chapter is conspicuous for its non-treatment of this important topic.

But not to consume more valuable space, we may say, in conclusion, that the author evidently has no conception of legal principles and his work is a mere hotch-pot to read which, would, in this short life, be a waste of valuable time.

This book should not be confounded with the Treatise on Forensic Medicine by J. Dixon Mann, of Worcester, England, which has only recently appeared, and which appears to be a very creditable performance.

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THE
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POWER OF THE PRESIDENT TO APPOINT SPECIAL
DIPLOMATIC AGENTS WITHOUT THE
ADVICE AND CONSENT OF THE SENATE.

By HENRY FLANDERS, Esq.

The executive power under the Constitution of the United States is vested in the President. In the administration of that power much must, necessarily, be left to his discretion. In the formal constitution of a government, the written instrument cannot precisely define the modes by which the powers granted shall be exercised. The implication is, that when any department of the government is charged with a duty, it may do, under the limitations of the Constitution, what is necessary and proper, in order to perform it. Hence, as the President is clothed with the executive power of the government, he may use all subordinate and ancillary powers essential to its due exercise.

As was said by Chief Justice MARSHALL in *Marbury v. Madison*, 1 Cranch. 137, 165: "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . and whatever opinion may be entertained of the manner in which

executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the Executive the decision of the Executive is conclusive."

(1.) The President is the Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the active service of the United States.

(2.) He has the power to make, with the sanction of the Senate, treaties of peace, commerce, alliance, and of every other description, subject to only one limitation, namely, that the treaties thus made shall not violate the principles of the Constitution.

(3.) He has the power, too, with the like sanction, to appoint ambassadors, other public ministers and consuls.

By international usage four classes of diplomatic agents are recognized. First: Ambassadors, papal legates and nuncios; second: Envoys and ministers plenipotentiary accredited to the sovereign; third: Ministers resident, accredited to the sovereign; fourth: *Chargés d'Affaires*, accredited to the Minister of Foreign Affairs.

Congress has no legislative power to create the office of "public minister." Any attempt to do so by introducing a new nomenclature, and, designating a commissioner with inferior and temporary functions as a "public minister," or "diplomatic officer," who must be appointed with the advice and sanction of the Senate, would exceed the legislative power. Of course, if a commissioner is, in fact, a "public minister" with diplomatic functions and rights under the law of nations, then, undoubtedly, his appointment must be with the sanction of the Senate, but irrespective of any Act of Congress, and irrespective of his official designation.

The offices of these ministers do not exist under or by virtue of any Act of Congress, but under the Constitution and under the law and usages of nations. It is to these offices thus existing that appointments are made by the President with the advice and consent of the Senate. Persons not

appointed to fill these offices are not, in the constitutional sense, and in the sense of the law of nations, "public ministers." Persons appointed for a special and temporary purpose in connection with foreign affairs, and whose employment ceases when the purpose is accomplished, are mere *pro tempore* aids to the President in the performance of his executive functions.

The President is the official head and representative of his country in its intercourse with foreign nations. Our ministers to those nations do not possess any defined, substantive powers, but they act under his instructions. "Within the range of constitutional authority, they have such powers as the President sees fit to grant, and no more" (C. Cushing, 7 Opinions of Attorney-General, 211).

An ambassador or other public minister is an officer of the United States, and holds an office under the Government of the United States. An agent sent out to a foreign country to investigate, to ascertain and report facts, or to negotiate a treaty, does not hold an office; but is engaged in a temporary employment. An office is a continuing position, and though the incumbent be changed, the duties remain. But an employment which is transient, occasional or incidental, can in no proper sense be termed an office.

In *United States v. Hartwell*, 6 Wallace, 385, 393, the distinction is clearly stated by the Supreme Court of the United States.

"An office," said the Court, "is a public station, or employment, conferred by the appointment of the government. The term embraces the ideas of tenure, duration, emolument and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary."

In *United States v. Germaine*, 9 Otto, 508, 512, the Supreme Court, by reference to *United States v. Hartwell*, reaffirmed its definition of office as a position whose duties were

continuing and permanent, not occasional and temporary. "In the case before us," said the Court, through Mr. Justice MILLER, "the duties are *not* continuing and permanent, and they *are* occasional and intermittent."

It has been the theory and practice throughout all periods of our government, for the President, in conducting its foreign affairs, to appoint special agents for special and temporary purposes; agents whose duties are not "continuing and permanent," but "occasional and temporary." And it is observable that among the most illustrious of our presidents and statesmen none have doubted that these appointments were a due exercise of executive authority, and did not need the advice and consent of the Senate.

Mr. Cushing, when Attorney General of the United States under President Pierce, in his letter to Mr. Marcy, the Secretary of State, on the Act of Congress, entitled, "An Act to remodel the diplomatic and consular systems of the United States," gives a resumé of cases, "in illustration of the power of the Executive to negotiate," as follows:

"President Washington granted to David Humphreys, on the second of March, 1793, without the previous concurrence of the Senate, a commission as commissioner plenipotentiary to treat with Algiers.

"Passing over intermediate incidents of the same nature, we come to the case of Charles Rhind, David Offley and Commissioner James Biddle, who, on the twelfth of September, 1829, were commissioned by President Jackson as joint and several 'Commissioners of the United States' to negotiate and did negotiate the existing treaty between the United States and Turkey.

"The same President, on the twenty-sixth of January, 1832, appointed Edmund Roberts as 'Commissioner of the United States' to negotiate treaties with the governments of Cochin-China and Siam; the result of which was the existing conventions with Muscat and Siam.

"On the sixteenth of August, 1849, Joseph Balestier received from President Taylor the appointment of 'Special agent of the United States' to Cochin-China and other parts of

Southeastern Asia; out of which came our treaty with Borneo.

"In conclusion of these precedents, we have the late case of the appointment of Commissioner Matthew C. Perry, under commission from President Fillmore of the thirteenth of November, 1852, to negotiate with Japan.

"We have modern examples, indeed, of commissions of the same nature for negotiations with some of the nations of Christendom, among which the following may be noted:

"On the third of May, 1838, Nathaniel Niles was commissioned by President Van Buren as 'Special agent of the United States' to the kingdom of Sardinia, and as such negotiated our treaty with Sardinia.

"On the twenty-eighth of March, 1846, A. Dudley Mann was appointed by President Polk 'Special agent of the United States' to treat with sundry States of Germany, and as such agent he negotiated the treaty with Hanover.

"Now, in the case of neither of these appointments, covering, as they did, important negotiations in Europe as well as in Asia, was there any authorizing Act of Congress, any preparatory specific appropriation, nor even a commission by and with the advice and consent of the Senate. In each instance, the successive Presidents acted, as did the earlier Presidents *in consimili casu*, in virtue of their constitutional power 'to make treaties,' that is, to negotiate and prepare them for the consideration of the Senate, just as in virtue of direct authority of the constitution, and without the aid of any mere enabling statute, he has the power to grant pardons for offences against the United States."

The foregoing are cases cited by Mr. Cushing; but the list is not complete. Succeeding administrations followed in the same line and under the same constitutional sanction. General Jackson appointed Edmund Roberts, of Portsmouth, N. H., a sea captain, as his agent, to visit the Indian Ocean for the purpose of examining the means of extending the commerce of the United States by commercial arrangements with the powers whose dominions bordered on those seas. He embarked on board of the United States sloop-of-war, the

Peacock, rating as captain's clerk, carrying with him blank letters of credence, and with instructions from Edward Livingston, Secretary of State, that if he should find the prospect favorable, he might fill up one of his letters to the Emperor of Japan for the purpose of opening trade. Did this create a breach of the constitution? Was this a usurpation on the part of the President? If so, it was not perceived by Mr. Livingston, who was a statesman and constitutional lawyer of great ability, not so great, perhaps, as the ability of present Senatorial critics, but who stood among the intellectual giants of his time, if not first, yet in the very first line.

In June, 1851, Mr. Webster, Secretary of State, instructed Commodore Aulick to proceed to Yeddo in his flag-ship, with as many vessels of his squadron as might conveniently be employed in the service, and deliver to such high officers of the Emperor of Japan as might be appointed to receive it—a letter from President Fillmore to the Emperor. The ostensible purpose of this visit, a visit in force, and suggestive of the *ultima ratio*, was to arrange for supplies of coal; but Commodore Aulick received "full power to negotiate and sign a treaty of amity and commerce between the United States and the Empire of Japan." In November, 1852, Commodore Perry, with an increased force, and with a copy of Commodore Aulick's instructions, which he was directed to consider as "in full force and applicable to his command," was sent to Japan, and where, as is well known, he concluded a treaty with the Emperor on the thirty-first of March, 1854.

In none of these instances were the agents nominated to the Senate, but were appointed by an act of executive authority alone. Nor were the names of Caesar A. Rodney, Theoderick Bland and John Graham sent to the Senate, who went out in a ship-of-war during the South American wars of Independence in 1816, as commissioners by appointment of Mr. Monroe, to inquire into the condition of affairs in those colonies, and to report as to whether they were likely to be successful in the pending struggle. This was done to aid the President in considering the question whether to acknowledge their independence. When they sailed the Senate was in

session, but, as we have seen, they were not nominated to that body, nor were their expenses paid out of the contingent fund. They were subsequently paid by Congress; Congress thereby becoming *particeps criminis* in this violation of the constitution!

During the Hungarian struggle for independence, President Taylor appointed Mr. Dudley Mann his agent, and invested him with power to declare to the Hungarians the willingness of the United States promptly to recognize their independence in the event of their ability to sustain it. His instructions were "to obtain information in regard to Hungary, and her resources and prospects, with a view to an early recognition of her independence and the formation of commercial relations with her."

Here was the delegation, as has been said, of sovereign powers to an agent, and that agent, not nominated to the Senate! And yet no one, so far as we know, was so bold as to claim that his appointment by President Taylor was an unconstitutional exercise of executive authority.

We had at the time a minister at the Court of Vienna, regularly appointed by the President of the United States, with the advice and consent of the Senate, and it might occur to those even who are not at all times accustomed "to peep narrowly into narrow bones," that it was a part, and a necessary part, of his diplomatic functions, in so grave a conjuncture, to obtain and furnish to his government information in regard to a rebellious province of the Empire to which he was accredited, and to keep it constantly advised as to the resources and prospects of the rebels.

It might be said, with great semblance of truth, if not with truth itself, that the functions of the known and acknowledged minister were, *pro tanto*, superseded by an unknown and secret agent, for his instructions enjoined on him not "to give publicity to his mission." And yet, the constitutional power of the President alone to make the appointment was not questioned, and this, too, at a period when the Senate of the United States was composed of abilities equal to any that have distinguished that body at any period of its history.

Austria, indeed, complained and reminded our government that "those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy."

Mr. Webster replied to the Austrian protest and complaint in his well-known letter to Mr. Hülsmann. "The American Government," he said, "sought for nothing but truth; it desired to learn the facts through a reliable source. . . . Mr. Mann's mission was wholly unobjectionable and strictly within the rule of the law of nations, and the duty of the United States as a neutral power."

It was not foreseen by Mr. Webster that one of his successors in that Senate over which he fulminated, would denounce the desire of President Cleveland to learn the facts respecting the revolution in Honolulu through a reliable source, as President Taylor desired to do with respect to the revolution in Hungary, as a bold and utter violation of the Constitution of the United States! And yet, President Cleveland, having withdrawn the treaty with Hawaii, submitted to the Senate by his predecessor for further consideration, was especially desirous of learning the exact facts of the situation, so that he might intelligently act with regard to them. It was a pending and pressing question.

During the Mexican war Mr. N. P. Trist, Chief Clerk in the Department of State, was sent to the headquarters of our army, under General Scott, without the sanction of the Senate, 'clothed with full powers to conclude a treaty of peace with the Mexican Government, should it be so inclined.' Should he arrange for a suspension of hostilities, then the army and navy were to "act in accordance with his directions and suspend actual hostilities until further orders from the Department."

Mr. Trist, as is well known, concluded a treaty of peace with Mexico, which was ratified by the Senate by a vote of 38 yeas to 14 nays; and the wise men of that day did not deny the executive authority to appoint the negotiator without the advice and consent of the Senate, nor criticise the fact

that Mr. Trist was invested with full power to arrange for a suspension of hostilities, without the intervention of either the naval or military commander, both of whom *quoad hoc* were subject to his directions.

It is needless to multiply examples, and we shall cite but one other, showing how uniform has been the practice of successive Presidents to appoint, upon their executive authority alone, these special diplomatic agents. About four months after the inauguration of President Grant, a negotiation was opened for the annexation of the Dominican Republic. Mr. Blaine, in his twenty years in Congress, Vol. 2, p. 468, tells the story, as follows: "In July General O. E. Babcock, one of the President's private secretaries, was despatched to San Domingo, upon an errand of which the public knew nothing. He bore a letter of instructions from Secretary Fish, apparently limiting the mission to an enquiry into the condition, prospects and resources of the island. From its tenor the negotiation of a treaty at that time was not anticipated by the State Department. General Babcock's mission finally resulted, however, in a treaty for the annexation of the Republic of Dominica, and a convention for the lease of the bay and peninsular of Samana—separately negotiated, and both concluded on the twenty-ninth of November, 1869."

President Grant laid this treaty, apparently negotiated by his special agent under secret instructions, before the Senate, and it was rejected. And what is observable is this, that the executive authority to send a special agent, without the advice and consent of the Senate, and the negotiation of a treaty by such agent, providing for the annexation of a foreign country to the United States, was not questioned by the Senate. The Senate of that day had not risen to the height of the great argument! It did not perceive the rent in the constitutional vesture! It did not seem conscious of the grave usurpation of the President, and his disregard of its dignity and powers!

It will be remarked that in the instances which we have cited of the appointment by the Executive of these diplomatic agents, the Senate was sometimes in session at the date of their appointment, and sometimes not. But in the greater

number of instances it was in session. That, however, is an immaterial circumstance. If he has the constitutional power of appointment alone it is of no consequence whether he appoints during the session or vacation of the Senate. And that he has this power we have endeavored to show.

As Commander-in-Chief of the Army and Navy the President may invest our ministers abroad with discretionary power to use the naval forces of the government stationed in their respective jurisdictions to protect American life and property. And as such Commander-in-Chief he may, in a particular instance, and in the exercise of his discretion, withdraw such power from the resident minister, and confer it upon a special commissioner, entrusted with a temporary duty. The wisdom of such withdrawal is a matter of purely executive discretion, and the decision of the Executive is conclusive.

The resident minister acts under instructions from the President. The President to enable his special commissioner more efficiently to perform the particular duty with which he is charged, may withdraw, *pro tanto* and *pro hac vice*, his instructions from the permanent minister, and make them applicable to the temporary commissioner. This does not change the character of the latter's service.

In accord with these principles were the instructions of the President, through the Department of State, to Mr. Blount, his special commissioner to the Hawaiian Islands.

"You will investigate," says the Secretary, Mr. Gresham, "and fully report to the President all the facts you can learn respecting the condition of affairs in the Hawaiian Islands, the causes of the revolution by which the Queen's Government was overthrown, the sentiment of the people toward the existing authority and, in general, all that can fully enlighten the President touching the subjects of your mission.

"To enable you to fulfill this charge, your authority in all matters touching the relations of this Government to the existing or other government of the Islands, and the protection of our citizens therein is paramount, and in you alone, acting in coöperation with the commander of the naval forces,

is vested full discretion and power to determine when such forces should be landed or withdrawn.

"You are, however, authorized to avail yourself of such aid and information as you may desire from the present minister of the United States at Honolulu, Mr. John L. Stevens, who will continue until further notice to perform the usual functions attaching to his office not inconsistent with the powers intrusted to you. An instruction will be sent to Mr. Stevens, directing him to facilitate your presentation to the head of the Government upon your arrival, and to render you all needed assistance."

As commentary upon the constitutionality and propriety of these instructions nothing more need be desired than the report of the Senate Committee on Foreign Relations. Although the *vox dei* is not always recognizable in the utterances of a majority, yet the report of this committee on this particular question, speaks, at any rate, the language of statesmanship and constitutional law. It is as follows:

"A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information, which, the President believed, was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions without dissent on the part of Congress or the people of the United States. The employment of such agencies is a necessary part of the proper exercise of the diplomatic power, which is intrusted by the Constitution with the President. Without such authority our foreign relations would be so embarrassed with difficulties that it would be impossible to conduct them with safety or success. These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, or as to the instructions which the President may give them.

"An authority was intrusted to Mr. Blount to remove the American flag from the Government building in Hawaii, and

to disclaim, openly and practically, the protectorate which had been announced in that country by Minister Stevens, and also to remove the troops from Honolulu to the steamer *Boston*. This particular delegation of authority to Mr. Blount was paramount over the authority of Mr. Stevens, who was continued as minister resident of the United States at Honolulu; and it raised the question whether the Government of the United States can have at the same foreign capital two ministers, each of whom shall exercise separate and special powers.

"There seems to be no reason why the Government of the United States can not, in conducting its diplomatic intercourse with other countries, exercise powers as broad and general, or as limited and peculiar, or special, as any other government. Other governments have been for many years, and even centuries, in the habit of intrusting special and particular missions to one man representing them in a foreign court, and to several men in combination when that was found to be desirable. In fact, there has been no limit placed upon the use of a power of this kind, except the discretion of the sovereign or ruler of the country. The committee fail to see that there is any irregularity in such a course as that, or that the power given to Mr. Blount to withdraw the troops from Honolulu, or to lower the flag of the United States, was to any extent either dangerous or interrupting to any other lawful authority existing there in any diplomatic or naval officer. There may be a question as to the particular wording of the order which Mr. Blount gave to Admiral Skerrett for the lowering of the flag and the withdrawal of the troops, but that is a hypercriticism, because the substantial fact was that Mr. Blount executed the command of the President in communicating to Admiral Skerrett such order, as the order of the President of the United States. Mr. Blount's authority had been known to Admiral Skerrett; his instructions had been exhibited to Admiral Skerrett; and they both understood that what Mr. Blount was then doing had received the sanction of the President of the United States before Mr. Blount had entered upon the discharge of his ministerial functions, and that his act

would receive the unqualified approval of the President of the United States. That being so, the mere form in which the order was addressed to Admiral Skerrett seems to be a matter of no serious consequence.

"The control given to Mr. Trist over the military operations in Mexico, when war was flagrant, was far greater than that which was confided to Mr. Blount."

FACTS WHICH ARE SAID TO PREVENT WORDS CREATING A SEPARATE USE FROM HAVING THAT EFFECT.

By R. C. McMURRAH, LL.D.

The decision of the Supreme Court of Pennsylvania in July last, in the case of *McConnel v. Wright*, 150 Penn. Rep. 275, must be most carefully considered by conveyancing counsel of that State. Its importance can scarcely be over-estimated, not only as to wills and settlements in the future, but as to all wills in the past. As exhibiting a peculiar development of the law it is of interest to the profession everywhere.

It is not proposed to criticise, for that is useless and possibly unbecoming, but there must be suggestions made that may assume the form of criticism, or be thought to do so, in the effort to make the point of the case clearly understood. For it is impossible to appreciate the effect of the decision without considering the grounds assigned for the judgment and their relative importance in ascertaining what is the precise point involved.

A testatrix devised real and personal property to a married woman (married at the date of the will), in fee simple. There was a power to sell for payment of debts and legacies and for the purposes of distribution.

The debts and legacies absorbed the personalty and there was nothing that came to the devisee but unimproved suburban or city lots. The taxes exceeded the income. The devise which was otherwise an unrestricted devise in fee, concluded

with these words, "*free from the control of her present or future husband and without any liability for the debts, liabilities or engagements of such husband, but wholly for her own use and benefit, subject to her control.*" The will was dated February 23, 1886. The testatrix died August 16, 1888, very nearly two years and six months after the making of the will. The property had been laid out in lots for sale, and the testatrix had sold some of them.

The devisee (then a married woman), sold some of the property, and in an action for the purchase money the want of power to convey and give a good title was the sole question.

The decision was that a good title had been conveyed.

Every fact that was supposed to bear on this question has been stated. And no one can or will dispute that the point intended to be decided was that the will did not convey a separate use, but an unrestricted fee simple.

It was not intended to depart from the Pennsylvania rule that the person seized of a separate use cannot convey a title unless expressly empowered by the instrument creating the title. Nothing can be clearer than that this rule was assumed to be obligatory.

It was not intended to decide that there was a power given under which the sale was valid. The contrary is implied throughout. The power that was given was referred to, but only as bearing on the character, or rather to use correct language, the quality of the estate.

The grounds of the judgment are: 1st. The words of the will defining the estate devised, conveyed a separate use. 2d. The testatrix must be presumed to have known the value and extent of her estate at the time she made her will. But the facts thus presumed to be in her mind and that bear on the meaning of the will, are facts as they existed at the time of her death. This is shown in the case stated and in the judgment. Whether they were the same as they were when she made the will does not appear; nobody alludes to this, though it is the basis of the judgment. But it seems moderately clear that when the will was made the property which the devisee was selling at \$19,000 an acre, did not yield income

sufficient to pay taxes, much less municipal charges. And it would be unfair not to admit that the court had a right to assume that the testatrix knew when she made the will that the property that would come to her devisee, was and would be burdensome, if it was to remain unsold.

3d. The reason for the decision is that the practical result of the facts was, that there was a homestead the devisee was desired to keep up, and no income furnished for the purpose. 4th. The devise was in fee simple. 5th. There was a power to sell and give receipts for the purchase money. 6th. The circumstances surrounding the testator at the time he makes his will may be considered in construing it. 7th. A separate use means an equitable estate as distinguished from a legal estate. 8th. The incidents (*i. e.*, of a separate use) are peculiar and undesirable. 9th. It is a question of intention—the burden of showing this is on one who asserts it—it is to be ascertained from the four corners of the will, the circumstances surrounding the testator when he made it, and the condition of his estate and his family. These are three wholly distinct things, one only of which is in writing.

Hence the court is constrained to say the testatrix did not intend to create a separate use.

The court had decided that the very words used in this will did create a separate use: 131 Pa. 476. It is also admitted in the judgment that they have this meaning.

It is thus quite clear that words declaring an intention to create a separate use are not to be relied on as always sufficient for that purpose.

The conveyancer will ask what am I to inquire into when I find a will declaring that the estate of a woman married when the will was made is to be a separate use. The subjects of inquiry are stated as separately or together being sufficient to take from those words their meaning.

It may be that the reasons for an opinion or rule may, if combined, be sufficient, though each one may have little weight, but in construing words of an ordinary legal instrument, one cannot but feel his incapacity to advise or act under such a theory. It may be useful, therefore, to eliminate from the

problem as many of the nine reasons as possible. For it is assumed that any one of the reasons which are shown to have no bearing at all on the question, need not trouble the anxious man of business who only seeks to guide himself in the path prepared for him by those authorized to direct and compel.

The question being not what a word describing neither the object given nor the devise, means in the sense of, refers or points to, but the meaning of the words of grant as describing the quantity and quality of the estate granted. The second, third, and sixth reasons consist in facts, and these facts are really comprised in one short statement—the income of property given would not pay the taxes—and what effect has this on the quantity of the estate? Such a state of facts proves a great ignorance in the testator of the business of a conveyancer, if he meant to devise a separate use, for the words creating a separate use exclude the power to sell or they mean nothing. The case of one devising land in separate use which ought to be sold because it yields no income is very common, so common that it has been provided for by general laws for the most ordinary cases, and, since 1853, for what was supposed to be all imaginable cases. Before this the Legislature was applied to. It had never been suggested that a necessity for selling had any effect to create a power or to indicate an intention to give an estate which gave the right to sell as an incident. But the books overflow with cases where this fact is no ground for the relief of creating a fee simple out of a less estate.

It may be that it is a nice distinction between evidence to identify an object or person and evidence of facts *de hors* the will to affect the meaning of the words, but one may respectfully suggest that, plain or obscure, it has been overlooked, for the two rules are in this judgment supposed to be one. That evidence is not admissible, for the later purposes by the English law needs no voucher. The point was urgently argued and decided: *Inchequin v. O'Brien*, 1 Cox, 9. Not less than five cases are cited in the note declaring that the words of the will and not the circumstances of the testator are to guide courts in their construction: 1 B. & B. 216; 3 Ves.

112; 1 Mer. 216; 1. Eden, 43; 2 Br. C. C. 297, and it is evident that this was the rule as late as 1857: *Grey v. Pearson*, 6 H. L. Cases, 106. The passage in Wigram there referred to is probably that on p. 9 on the admission of intrinsic evidence, where it is stated that evidence is never admissible *to change the meaning of the words expressed*: and this does not mean that a man can't swear to a meaning, but that no evidence of *facts* fixed and eternal or transient and fleeting written or oral, can effect the meaning of the words. The reason for the rule has been overlooked wherever this distinction has not been observed, and this has not been infrequent with us. Such evidence transfers the determination of the meaning of the document to the jury. Such is the universal rule where oral and written testimony are combined. The result is the Statute of Wills is repealed—and as these reasons may be given the go by as antique nonsense, it may be added of what possible use is the Statute of Frauds, and of what use are Deeds if this rule is to be admitted.

There is not and never was any difference between the rules for admitting evidence in the case of deeds and in the case of wills on the question of intention. The jury in ejectment always determine the applicability of the deed to the subject in dispute; but the effect of the deed or will in determining the character of the estate has never before been supposed to depend on the *res geste*, or the environment of the parties.

It is, however, clear that whether the distinction was overlooked or overruled, the court has decided that this kind of evidence is admissible, and that facts of this kind do serve to prove an intention to create an estate absolutely distinct and different from the one created by the words; so distinct an estate as to give a right to sell where none existed, and a right to spend the proceeds where no such right exists by virtue of the estate defined by the words of the will.

It is, of course, immaterial that our rule differs from the English rule, though it deserves notice that no one has ever ventured to declare this different result is intentional. It is quite important that the change leads to such results.

It will be found that this is the *only* ground the decision can

rest on; the other reasons do not exist. They are so utterly empty as scarcely to be capable of misleading any one.

The fourth reason is that the devise was in fee simple. There is in this a very unfortunate vagueness, and possibly there was a confusion with the thought expressed in the seventh reason. It has never been suggested that the quantity of the estate had any bearing on the intention to create a separate use; though there have been questions raised where no trustee was interposed. But, united or distinct, these facts have nothing to do with the question. I say this for it has been settled for so long, long before Pennsylvania ever heard of a separate use, that it is the merest question of curiosity, whether it ever was supposed to be otherwise, that there need not be interposed a legal estate to support the separate use or that the estate of the *cestui que* use needs to be restricted in quantity. To say that a separate use cannot be declared in favor of a devisee in fee would be precisely on the level of saying that an absolute equitable estate in one *sui juris* was not liable to be sold for the payment of his debts—it would be a mere misstatement.¹

As a matter of interest we may point out that the question whether a separate use could be created in favor of a devisee in fee was argued, decided in *Cochran v. O'Hern*, 4 W. & S. (Pa.) 95, in 1842. It was *the* point in the case—on the will not on the deed—which was whether there was courtesy in such an estate. It was the point argued by Messrs. McCandless & Biddle. It was decided by GRIER, P. J., below, and with a distinct knowledge of what he was doing, and in the court above. The same point had been decided as early as 1821 (*Jamison v. Brady*, 6 S. & R. Pa. 466), as a proposition requiring no further argument than that the want of a Court of Chancery did not destroy the right of a wife in whose favor the separate use had been created to protection. The right was recognized by courts

¹Is it generally known that C. J. GIBSON says: *Nothing is more to be deprecated than the decisions that a cestui que trust can dispose of his estate*: 1 Raw. 247. He is speaking of trusts for men as well as women, and what are we to think of the mind of a judge that gravely regrets that all trust estates are not inalienable, and who evidently assumes there was a time when they were not, subject to alienation.

of law when the jurisdiction was separate: 13 C. B. 639, and in *McKenan v. Phillips*, 6 Wharton (Pa.) 571, it was said a countless train of authorities spring up to support the proposition. I very much doubt if, from the time separate uses were invented, there ever was suggested even a doubt on the point before this. In 12 Harris, 429, LOWRIE, J., says, something that might be supposed by a careless reader to mean that the separation of the legal title is necessary. But it will be found he is attempting to explain a self-evident proposition, and in doing so misstates a rule of law. There was no pretence of a separate use in the case, an unfortunate attorney was ignorant enough to think it could be created by purchasing with the wife's money. The remark does not rise to the dignity of a dictum. This, which is less than an *obiter dictum*, *this is the authority* relied on to support the 7th reason. In 5 Barr, 385, the precise reverse was decided and was the point of the case.

Unless, therefore, the rule *ex nihilo nihil fit* does not apply in ratiocination, it is plain reasons 4 and 7 are eliminated.

The 5th is that there was a power to sell and give receipts, but the power is restricted to sell in payment of debts and legacies and could not be exercised for the occasion never arose. And as a matter of inference it is precisely the reverse of the inference that is drawn. Powers may be used to show what estate is given, but then they are not what we call powers. They are words indicating the kind of use or enjoyment that can be made of the thing given, or defining the incidents of the estate from which the nature of the estate may be inferred; they are what are called *motives* for giving, not purposes for which the property is given. The distinction was first suggested by Sir W. Grant, 6 Ves. 249, and acted on by Sir W. Page Wood in *Saunderson's Trusts*, 3 K. & J. 507. But a power to sell and give receipts has no meaning at all if the donee of the power is also the owner, unless the legal estate is in another. Therefore, instead of proving that the words have an intention to give a beneficial fee, they imply that the testator thought she was giving an estate that could not be applied even to pay her own debts

and legacies unless a power was given. And the same remark applies to the power to sell to settle the estate.

The 8th is difficult to deal with. One asks what bearing on the meaning of the words defining an estate has the fact that the incidents of the estate thus created are *peculiar* and *undesirable*. Peculiarity of incident, is the creation of the law. It is impossible to conceive of this as tending to change the meaning of words given by the law itself. It is a mere contradiction. The *undesirability* of the incidents is a good reason for changing them or destroying the estate that had the incident, as was done with estates tail. But when we remember that these incidents are solely the creations of the court, and this particular one the most sedulously cherished and proclaimed as the product of the superior wisdom of our courts over the English Chancellors, it seems difficult to conceive that these can either, separate or combined, be a reason for affecting a change in the meaning of the words defining the estate.

The 9th, viz., that it is a matter of intention no one disputes. The decision, therefore, is that the *intention* as to the quantity or quality of the estate granted, is to be ascertained from facts outside the will, and not from the words defining the estate, and these facts can suffice to vary the written description of the estate in the will; the facts being that a power of sale is required for the enjoyment of an income for maintenance, and that without such a power the devise is a burden.

This is a rule under which conveyancers must practice. A Brief of Title will hereafter contain a statement of the character of the property and its capacity of being utilized without a sale, as determining the nature of the estate. It is not in the will we are to look for a definition of the estate.

The testatrix (presumably knowing the law) selected words disabling her devisee from selling, and gave no power to sell; how does this tend to show she did not mean to disable her, but that she meant the exact reverse. Would it not be well to ascertain what these aphorisms mean, or to stop using them?

Now, the constant reiteration of phrases like this, really misleads; the will means what it says, and no one ought ask or care if the testator did, or did not, intend it. The statute forbids the ascertaining his intention in any other way *than by a writing signed*, and here it is, quite plain that the words used have no meaning or effect, except to exclude the right to sell or deal as owner. The husband's rights are excluded, and so are those of his creditors. A clause is, therefore, struck out, because, if it operates, the property costs more than can be got from it by renting. This is certainly the new rule by which to construe a will, though reduced in bulk, and with the fog of words dispersed.

Two things are perfectly clear. The testatrix could not have really known the state of the law, or the meaning of the words she used, or she was very foolish, if not cruel. But these facts are absolutely immaterial. She did what thousands have done; she omitted to give a power, probably not knowing it was needed. Before 1853, we applied to the Legislature. *Norris v. Clymer*, 2 Barr., shows that no one supposed that facts such as existed here affected the meaning of the will, or enlarged or altered an estate, or even confined a power. The Price Act of 1853, has no excuse for existence, except the existence of facts like those which have now become the chief factors to determine the meaning of the words of a will as to the quality of the estate. Not what thing was meant by a word, but what a thing is, that can be created only by words, *i. e.*, the definition of words, and those purely technical words.

Another change has been made that seems to have been overlooked. The testatrix used words that meant three things, that is, effected three consequences. They meant that the devisee cannot sell, she cannot devise, and her husband cannot have any interest in the thing devised. Yet, though using these words with a knowledge of the state of her property, that knowledge makes them mean that the devisee may sell and spend the money, and she may devise, and the husband will be tenant by the courtesy if the land is not sold; if it is, he will own a third, or a half of the proceeds, if they are not squandered:

If all this has been affected by overlooking so commonplace a rule of evidence as that which prohibits the *meaning of the words* of a will (not their application to a subject), to be affected by parol or by facts, *dehors* the will, it is quite impossible to say where the effect of the judgment will end, for it covers all documents under which property is transferred, whether deeds, wills, or contracts.

Does not the decision deserve the study of all conveyancers. And is it indecorous to endeavor to attract that attention and endeavor to make the point clear?

There are two points for criticism on this judgment. 1st. The evidence was inadmissible for the purpose to which it has been applied. The citation of the authority may seem a mere impertinence, for what authority can equal that of the Supreme Court? But it is not an authority for a legal dogma which might have been stated the other way. The authority is merely the explanation, or rather the application of a statute, and one that cannot be over-estimated in importance. The will must be in writing, and *no external evidence can be admitted to prove the meaning of the words*, because the statute requires it to be in writing. If facts *dehors* the will can give a meaning to the words, the will is no longer in writing, it is partly in writing, and partly in the facts. The rule as stated in the judgment, criticised, is the same in England as here; the mistake was in supposing it to be a universal proposition, a mistake of logic which seems to be inherent in the American mind; probably from the contempt for scholastic training which we see and hear on all sides.

2d. The evidence, if permitted to be read, had no tendency to *prove the point for which it was used*. It certainly proves either great folly or absolute ignorance, or something worse in the testatrix; if it proved her intention as to the kind of estate she meant to give, that is one that her devisee could sell and convey, it proved a mistake was made in writing the will. But no one can possibly assert that an intention, if proved or admitted, tends in the slightest degree to change the meaning of the deed or document. It may authorize a reformation, and the fact that such a jurisdiction is ever exercised, proves

that the meaning is not changed, but that the reverse is true. But this reformation is not permitted in wills; not because they are more sacred than any other paper, but because the statute requires them to be in writing and signed at the end; if they are not signed, the property by law belongs to the heir or next of kin, and *the power to divest that title has not been well executed*. This doctrine is obscured by the mode of stating it copied from Lord Coke. It is by him stated as if it were the fondness of the law for the heir. Whereas, it should be stated as a power given by law to take from the heir, provided it is done in a certain way.

The way to test this, is to assume that instructions in writing signed by the testator were to give an estate that would at the same time enable the devisee to sell and use the money but also confer a separate use. Then, that the will was written in these words, and the testatrix assured this would have the effect she desired. No one would, or could then dispute that the conveyancer had blundered; no one would attempt to argue that the meaning of the will was changed, or that the instructions could be used to construe the will. It may be that it is better to let in the evidence and go to a jury on the meaning of wills. But the alternative is either this or the English rule, which till now, we have always supposed was the same as ours. And certainly no one desires or intends anything so absurd as to change the rule.

Probably the question of the admission of evidence turns on the meaning of *sensible*. If that has the meaning that it has in characterizing a will as a sensible will, when conversing about a friend's will, the court was right in looking at the evidence to ascertain that it was a very foolish will, and of what importance is that fact? But if by sensible is meant capable of operation, though producing unfortunate and probably unforeseen results, which is the legal meaning of the word, the evidence, if admissible, had no bearing on the will.

Oxenden v. Chichester, 4 Dow, 65, decides that if there be a thing answering the words used to describe it in a devise, no evidence is admissible that the testator intended something else to form part of that thing for the purpose of the devise.

As there is no power to vary a principle once decided in the House of Lords saving by Act of Parliament, and it is absolutely immaterial whether the decision is right or wrong, we may be quite certain that this is still the rule in that country. And, therefore, when they use the same words as we do as to the admissibility of evidence, they do not mean that you can change the meaning of the words by any facts, if those words can mean what they express when applied to things as they are. Has any one ever pretended or imagined that the canon of evidence had a different meaning on the opposite sides of the Atlantic.

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G. C. & S. F. RY. CO. v. GILBERT.¹ COURT OF CIVIL
APPEALS OF TEXAS.

Carriers—Delay in Transportation—Special Damages.

1. In order to charge a carrier with such special damages for delay in transportation, as the rental value of machinery intended for immediate use, special notice of the intention must be given at the time of shipment and not afterwards. 22 S. W. Rep. 760, reversed.

2. The ordinary measure of damages for delay in transporting goods is the depreciation suffered, and the rental value of the goods for the time of the delay; these damages must be specially pleaded and proven. 22 S. W. Rep. 760, reversed.

THE MEASURE OF DAMAGES.

1. The ordinary measure of damages resulting from delay in the delivery of an article shipped, is the difference between the value of the article when due and when delivered.

2. Damages for the value of the use or rent of a machine can be recovered only when the special purposes of the shipment are made known to the carrier at the time of the contract of shipment.

Questions as to the measure of damages for breaches by a carrier of contracts of shipment of merchandise, present few novel or difficult problems. Since, however, such questions are of daily occurrence, and since the textbooks with their voluminous excerpts, refined distinctions and

interminable references, rather confuse than enlighten the reader, it is believed that a short analysis of the subject, citing only new or leading cases, may be of practical value.

The general doctrine as to the measure of damages in cases of contract is summarily comprehended in a few pages of Pothier on Obligations: (Evans Poth. on Ob. (1st Am. Ed.) Vol. I. p. 80, et seq.) This summary statement is referred to in most of the leading cases and forms, confessedly, the basis of the entire jurisprudence of England and America upon the subject. It is unfortunately too long for reproduction here; but its substance is found in Article 1928 of the Louisiana Civil Code of

¹ Reported in 23 S. W. Rep. 320.

1826, known as the "Louisiana Rule," and said in Sedgwick on the Measure of Damages (Vol. 1. p. 67), to be "the clearest and most definite rule that can be framed in this perplexing matter."

That Article is as follows:

"Where the object of a contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained and the profit of which he has been deprived, under the following exceptions and modifications:"

"1. Where the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract."

It is necessary to separate at once from the authorities to be considered, a class of cases comparatively few in number, but exceedingly troublesome. In this annotation cases will not be considered where the parties have put themselves outside of the general rules, by special notices or special contracts, and where the decisions turned entirely upon the sufficiency of such notices or the proof of such contracts.

It must be noted, moreover, that a carrier's contract should be considered, in respect to damages, without reference to decisions upon other kinds of contracts, supposed to be similar. Without going into nice distinctions on the subject, it is enough to say that contracts to build a boat, to repair machinery, to return a deposit, and to carry a shipment, differ from one another *toto modo* on the very important point of implied notice. He who repairs

machinery knows, or should know its probable use; but a carrier may take a shaft across the country without knowing whether it is intended for a steamship or a sugarhouse.

As a general rule, the measure of the carrier's liability is the market value of the shipment at its destination, computed at the time when it should have been delivered, less transportation charges, with interest.

1. It is an old contention on behalf of the carrier, which still occasionally reappears, that the value when shipped should be the measure; both on account of a supposed analogy to insurance, and because the destination value includes profits. The leading case on this point is that of *Gillingham v. Dempsey*, 12 S. & R., 163 Penn. (1824). It cites all the authorities back to the beginning of the century and lays down the rule that the destination value is the test. This is now the settled jurisprudence, and this measure has been used in all the cases cited under the different heads below. Other leading cases are: *Spring v. Haskell*, 4 Allen, 112 (1862); *Dean v. Vaccaro*, 2 Head, 488 Tenn. (1859).

But the prime cost or shipment value, plus expenses, is a mode of reaching the destination value, which may be used in the absence of direct proof, to which it yields: *McGregor v. Kilgore*, 6 Ohio, 358 (1834); *North. Transp. Co. v. McClary*, 66 Ill. 233 (1872); *R. Co. v. Phelps*, 46 Ark. 485 (1885); *Rome Rd. v. Sloan*, 39 Ga. 636.

2. The freight, if unpaid, is, of course, to be deducted from the destination market value.

It is obvious that any other rule

would place the shipper in the same position as if the contract had been performed, without payment of the consideration: *North. Transp. Co. v. McClary*, 66 Ill. 233 (1872); *Atkinson v. Castle Garden*, 28 Mo. 124 (1859).

3. The market value is to be computed at the destination. By the destination is meant the terminus of the road, and not the final destination which the shipper may intend the freight to reach: *R. Co. v. Hale*, 1 S. W. Rep. 620 Tenn. (1886); *Ingledeu v. R. Co.*, 7 Gray (Mass.), 86; *R. Co. v. Reynolds*, 8 Kansas, 623 (1871); *R. Co. v. Henry*, 14 Ill. 156 (1852).

4. Contracts of shippers with the consignee or other persons, of which the carrier is not notified at the time of the shipment, are not to be considered in the calculation of damages as against the carrier.

In the following cases such damages were not allowed: *Murrell v. Pacific Exp. Co.*, 14 S. W. Rep. 1098 Ark. (1890); *Ramish v. Kirchbraun*, 33 Pac. Rep. 70 Cal. (1893); *Scott v. S. S. Co.*, 106 Mass. 468 (1871); *R. Co. v. Moulford*, 3 S. W. Rep. 814 Ark. (1887); *Harvey v. R. Co.*, 124 Mass. 421 (1878); *Lindley v. R. Co.*, 88 N. C. 547 (1883).

In the following case there was such notice and accordingly such damages were allowed: *Deming v. R. Co.*, 48 N. H. 455 (1869).

The English authorities to this effect are cited and discussed in *Deming v. R. Co.*, and *Harvey v. R. Co.*, *supra*; and in *Langdon v. Robertson*, 13 Ontario Reports, 497; 30 A. & H. R. R. Cas. 23.

5. Depreciation in the market, during delay, is not too remote for consideration, and forms an element in the measure of damages.

The leading case to the contrary was *Wibert v. R. Co.*, 19 Barb. 36 (1854). There was great conflict of authorities in New York on this point for many years, but the rule was finally settled as above stated in *Ward v. R. Co.*, 47 N. Y. 29 (1871). In other States the rule was earlier settled: *Cutting v. R. Co.*, 13 Allen, 381 (1866); *Simson v. R. Co.*, 14 Mich. 489 (1866). The rule is now uniformly accepted and hundreds of cases might be cited.

6. But in cases where the shipment is intended for a particular market day, damages resulting from delay beyond that day, are not recoverable unless the carrier had express notice, or implied notice from a custom so general and well-known as to amount thereto, that the shipment was intended for that particular market day: *R. R. Co. v. Lehman*, 56 Md. 209 (1881); *Hamilton v. R. Co.*, 3 S. E. Rep. 164 North Carolina (1887). But in *R. Co. v. Case*, 23 N. E. Rep. 797 Indiana (1890), and in *Ayres v. R. Co.*, 43 N. W. Rep. 1122 Wisc. (1889), such damages seem to have been given with little, if any, proof of notice.

7. The loss of profits from an intended special use of the shipment are not recoverable, unless notice as to that use was given at time of shipment: *Cooper v. Young*, 22 Ga. 269 (1859); *Hadley v. Baxendale*, 9 Ex. 341; *R. Co. v. Ragdale*, 46 Miss. 459 (1872); and English cases cited *Harvey v. R. Co.*, *supra*. The case of *R. Co. v. Pritchard*, 77 Ga. 412 (1887), often cited as contra, was really controlled by the peculiar language of the Georgia Code, as will be seen on examina-

tion of the Georgia cases which it cites as precedents.

8. In cases of refusal or failure to receive for shipment, the measure of damages is the difference between the destination value and the shipment value, less transportation charges. If the shipper can lessen the damages by shipping in another way, he may and should do so: *Grund v. Prendergast*, 58 Barb. 216. But not if this action will increase the damages: *Ward's etc. Co. v. Elkins*, 34 Mich. 439 (1876). The shipper may charge carrier for storage, deterioration, etc., while pending notice of refusal: *R. Co. v. Flannagan*, 14 N. E. Rep. 370 Indiana (1887).

9. In cases of delay and injury the shipper or consignee cannot abandon the goods and sue for their entire value: *Hackett v. R. Co.*, 35 N. H. 390 (1851); *Shaw v. R. Co.*, 5 Rich. (Law), 462 South Carolina (1852); *R. Co. v. Tyson*, 46 Miss. 729 (1872); *Briggs v. R. Co.*, 28 Barb. 515 (1858). This is true except under very extreme circumstances, amounting practically to total loss: *R. R. Co. v. Warren*, 16 Ill. 302 (1855).

10. The Texas case annotated, states that the rental value of machinery intended for use cannot be recovered without notice given at the time of shipment of the intended use.

This is the rule laid down in *R. Co. v. Ragdale*, 46 Miss. 459 (1872), generally considered the leading case. And the case of *British Col. Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499, demands that the carrier should have very full notice and knowledge.

The case of *Priestly v. R. Co.*, 26 Ill. 205 (1861), is directly contrary to the current of authorities as well

as to the general principles of the law. It allows "a fair value for the use of the machinery" during the period of the delay, claiming that this furnishes fair compensation to the shipper; but no consideration is given to the point that such damages could not be even approximately estimated by the carrier at the time of shipment, without special information. "A fair rental" for machinery, after deducting interest on its value, depreciation from time and use, and other items, either disallowed or allowed under other heads, would be a puzzle for an expert, even if he were fully informed as to the facts. It can hardly be supposed that a carrier contracts with reference to such damages and has them in his mind when he is asked for a rate simply on a shipment of machinery.

11. Expenses incurred in looking after goods were allowed in *Deming v. R. Co.*, 48 N. H. 435 (1869); but refused in *Ingledeu v. R. Co.*, 7 Gray, 86 Mass.; *R. Co. v. Kennedy*, 41 Miss. 671 (1868); *Briggs v. R. Co.*, 28 Barb. 515 (1858). When these expenses have actually resulted in decreasing damages, they are, of course, allowed: *R. Co. v. Akers*, 4 Kan. 452 (1868). Such expenses have generally been so small, comparatively, in amount, that the courts have devoted very little time to their consideration.

It may be observed, in conclusion, that the English and American cases are in unusual harmony upon this entire subject; and that frequent citations in the decisions, from the Code Napoleon, the works of Pothier, and the Corpus Juris Civilis, show how far this harmony is due to the labors of the civilians.

VICTOR LAOBY.

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STATE *v.* COSTELLO.¹ THE SUPREME COURT OF ERRORS OF CONNECTICUT.

The defendant was convicted on an information charging that he "with force and arms wilfully did injure a public building and house of worship situate," &c.

On appeal it was *held* that the information, although in the words of the statute, was insufficient, in failing to set forth particularly the manner of the injury.

AS TO THE SUFFICIENCY OF THE DESCRIPTION OF AN OFFENCE IN AN INDICTMENT MERELY IN THE WORDS OF THE STATUTE.

The general rule on the subject of the sufficiency of an indictment is declared in the cases of *U. S. v. Mills*, 7 Peters, 138 (1833); *U. S. v. Simmons*, 96 U. S. 360 (1877); *U. S. v. Carll*, 105 U. S. 611 (1881), and *U. S. v. Pond*, 2 Curt. C. C. 265 (1855).

In *U. S. v. Mills*, *supra*, Mr. Justice Thompson, in delivering the opinion of the court, said (p. 142): "the general rule is that, in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, where particular words must be used, and no other

words, however synonymous they may seem, can be substituted. But in all cases the offence must be set forth with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged."

In *U. S. v. Simmons*, *supra*, Mr. Justice Harlan, in delivering the opinion of the court, said (p. 362) "where the offence is purely statutory, having no relation to the common law, it is as a general rule sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute without any further expansion of the matter. . . . But to this rule there is the qualification, fundamental in the law of criminal procedure, that the accused

¹ 25 Atlantic Rep. 477. Decided June 30, 1892.

must be apprized by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence."

In *U. S. v. Carl*, *supra*, it was held that it is not sufficient to set forth an offence in the words of the statute unless they "fully, directly and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offence."

In *U. S. v. Pond*, *supra*, it was held that, in general, it is sufficient to describe an offence created by statute, in the words of the statute, unless they embrace cases which the Legislature did not intend to include within the law. If there be such cases, the indictment should show that this is not one of the cases thus excluded.

In *Hawkins Pleas of the Crown* b. 2, c. 23, s. 111, it is said that it is not sufficient to pursue the very words of a statute unless by so doing you fully and expressly allege the fact, in the doing, or not doing, whereof the offence consists, without any uncertainty or ambiguity.

Mr. Wharton, in his work on *Criminal Law*, 7th Ed., Vol. I, § 364 *et seq.*, says, that in general it is sufficient to describe an offence created by statute in the words of the statute, unless it is a case "in which the mere recital of the words of the statute do not constitute in completeness the description of the legal offence."

In Pennsylvania it is sufficient, since the Criminal Procedure Act of March 31, 1860, if the indictment charges the offence substantially in the language of the Act of Assembly. If, however, it is not

definite enough, the defendant can apply for a bill of particulars, and the district attorney will be restricted thereto: *Williams v. Com.*, 91 Pa. 493 (1880), and *Com. v. Maher*, 16 Phila. 451 (1883). This makes the present law in Pennsylvania somewhat different than in other states.

In the following cases, the indictments stated the crimes merely in the words of the statute, and were held to be good.

In *King v. Fuller*, 1 B. & P. 180 (1797), it was held sufficient to allege an endeavor to seduce a person serving in the king's army from his allegiance to the king without specifying the means employed.

So in *Boyles v. Com.*, 2 S. & R. (Pa.) 40 (1815), it was decided that an indictment charging the defendant with privately concealing the death of a bastard child, need not set forth in what manner, or by what acts, she endeavored to do so. But in an indictment for fornication and bastardy, the sex of the child must be stated. *Simmons v. Com.*, 1 Rawle (Pa.), 142 (1839).

The same decision was reached with reference to an indictment charging the defendant with seducing and debauching a woman. The word "seduce," when used with reference to the conduct of a man towards a woman, has a precise and determinate signification, and it is not necessary to charge the offence in any other language: *State v. Pierce*, 27 Conn. 319 (1858), and *State v. Curran*, 51 Iowa, 112 (1879).

This rule was followed even in the case of a felony, and an indictment charging the defendant, in the words of the statute, with committing an assault with a deadly weapon, was upheld by the Supreme Court of California. *People v. Mar-*

seiler, 11 Pacific R. 503 (1886).

On the other hand, in some cases, the courts have required that indictments should be extremely full and explicit, or in other words should be "certain to a certain intent." As examples of this class of cases may be cited *Coke on Lit.*, 303 a; *King v. Airey*, 2 East, 33 (1802); *King v. Stevens*, 5 East, 244 (1804); *U. S. v. Forrest*, 3 Crauch C. C. 60 (1826); *State v. Scay*, 3 Stewart (Ala.), 131 (1830); *Com. v. Walters*, 6 Dana (Ky.), 290 (1838), and *State v. Hand*, 1 English (Ark.), 165 (1845).

In England, under the game laws, it is necessary to traverse every legal qualification, as that the defendant was not possessed of lands of the clear yearly value of £100, &c., and it is not sufficient to merely allege that he was not duly or legally qualified: *King v. Hill*, 2 Ld. Raym. 1415 (1725), and *King v. Jarvis*, 1 Burr. 148 (1757).

In an indictment for conspiracy it is necessary to set forth the acts specifically, and show the intended means by which the fraud was to be compassed: *Lambert v. People*, 9 Cowen (N. Y.), 578 (1827), and *Hartman v. Com.*, 5 Pa. 60 (1847).

Likewise an indictment for obtaining goods under false pretenses, must set forth all the material facts and circumstances which the prosecutor would be bound to prove in order to procure a conviction: *Com. v. Strain*, 10 Metcalf (Mass.), 521 (1845); *People v. Gates*, 13 Wend. (N. Y.) 311 (1835), 1 Chitty, 141; *State v. Philbrick*, 31 Me. 401 (1850), and *Com. v. Galbraith*, 24 Leg. Int. (Pa.) 117 (1867), and *Russell on Crimes*, 9th Ed., Vol. II, 669. But these details may be dispensed with by statute: *State v.*

Morgan, 20 S. W. Rep. (Mo.) 456 (1892).

In *People v. Taylor*, 3 Denio (N. Y.), 91 (1846), the defendant was charged with settling "on foot a certain lottery, for the purpose of exposing certain money to abide the drawing of such lottery, he, the said defendant, being unauthorized," &c. *Held*, to be insufficient as the indictment should have given some further description beyond a general statement of the purpose of the lottery. And in *Markle v. State*, 3 Ind. 535 (1852), the indictment charged defendant substantially, with unlawfully making a certain lottery for a division of property to be determined by chance, the making of which was not authorized by law: *Held*, to be bad for not stating the species of property as property is a generic term.

The Supreme Court of Iowa, in *State v. Bitman*, 13 Iowa, 485 (1862), *held* that an information charging the defendant with cruelly and inhumanely whipping and beating his own child, being about three years old, "was insufficient, in not setting out the name of the person upon whom the offence was committed.

In *Quinn v. State*, 35 Ind. 485, the indictment charged the defendant, in the words of the statute, with having voted at an election, "not having the legal qualifications of a voter." *Held*, to be insufficient for not specifying what qualifications the voter lacked—for alleging, not a fact, but a conclusion of law. A similar decision was reached in *State v. Bruce*, 5 Ore. 68 (1874), and *State v. Moore*, 3 Dutch (N. J.), 105 (1858). In the case, however, of *State v. Lockbaum*, 38 Conn. 400 (1871), the

court upheld an information charging the defendant in the words of the statute, with attempting to vote illegally at an elector's meeting, by assuming the name of another. The court said that the defendant must show that additional averments are necessary to insure a fair trial or protection against another prosecution.

In *State v. Allen*, 32 Iowa, 491 (1871), the defendant was charged with selling "intoxicating liquors in violation of the laws of the State of Iowa." *Held*, to be insufficient as the name of the purchaser should have been stated, if known. And in *People v. Burns*, 6 N. Y. S. 611 (1849), the defendant was indicted for selling impure milk. On demurrer it was *held* that the name of the purchaser should have been stated, if known, and if it was not, such fact should have been alleged. To constitute a sale, there must have been a purchaser, and the defendant was entitled to be informed who such purchaser was so that he could disprove such sale on the trial of the case.

In another case, the defendant was indicted under a statute which provides that "every person who shall hire any horse, and shall wilfully make any false statement relative to the distance, time, place or manner of using the same with intent to defraud, shall be punished by fine," &c: *Held*, that it is not sufficient to describe such an offence in the general language of the statute, but the misrepresentation, and the person to whom made must be stated with particularity. *State v. Jackson*, 39 Conn. 229 (1872).

In *State v. Murray*, 41 Iowa, 580 (1875), the defendant was convicted on an information charging that he

did "wilfully and maliciously assault one, Bridget McCoy:" *Held*, that it was insufficient in not stating "the acts constituting the offence." It is not enough to merely charge the commission of a crime by its technical name.

So, in another case, the defendant was convicted of presenting for payment a pension certificate, which the indictment alleged he had procured upon false and fraudulent proofs, and by unlawful and fraudulent devices. On motion in arrest of judgment, the court said that the allegations were not sufficient to inform the accused, with that certainty which the law requires, of the nature of the accusation against him, to the end that he might prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence. *U. S. v. Goggin*, 1 Fed. R. 49 (1880).

On a prosecution under the Act of May 30, 1870, known as the "Enforcement Act," the Supreme Court of the United States, *held* that an indictment was insufficient which charged the defendants, substantially in the language of the statute, with banding together with intent to unlawfully and feloniously injure, oppress, threaten and intimidate two citizens of the United States, of African descent, and prevent them from exercising their lawful right and privilege of peaceably assembling together, and of enjoying those rights which are secured to them by the Constitution and laws of the United States. Mr. Chief Justice WAITE, in delivering the opinion of the court, said (p. 558): "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by

statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars." *U. S. v. Cruikshank*, 92 U. S. 542 (1875).

A decision very similar to that in the principal case was reached by the Supreme Court of Iowa in *State v. Butcher*, 79 Iowa, 110 (1890), where the defendant was convicted of "committing the crime of wilfully and unlawfully interrupting and disturbing a school." *Held*, in arrest of judgment, that the indictment was defective because the acts constituting the offence were not set forth. "The statement does not show what was done, excepting by the averment of a legal conclusion."

In another case the Supreme Court of South Carolina decided that an indictment for the violation of a written contract to serve as a laborer, which did not set out the contract or show that the contract, which is alleged to have been broken, was one contemplated by the statute, did not charge an indictable offence. The statute does not purport to include every contract between a laborer and a landlord. *State v. Williams*, 10 S. E. R. 876 (1890).

In *Luter v. State*, 22 S. W. Rep. (Tex.) 140 (1893), the defendant was convicted on an information charging him, in the words of the statute, with preventing another person from performing the duties of "a lawful employment." *Held*, on appeal, that the information was defective in not setting forth the nature of the employment.

In *U. S. v. Patterson*, 55 Fed. Rep. 605 (1893), the defendant was

indicted in the words of a statute prohibiting combinations, contracts or conspiracies in restraint of trade, and making it a misdemeanor to monopolize, or attempt or conspire with others to monopolize, any part of the trade or commerce among the several States or with foreign nations: *Held*, that the indictment was insufficient, as the means should have been stated whereby it was sought to monopolize the market, in order that the court might see whether they are illegal.

It has, however, been considered that "courts should not be astute to discover defects in an indictment," and they have, therefore, held that indictments are sufficiently technical which state the offence so plainly that a man of ordinary capacity would readily understand the nature of the offence charged. This alone is the criterion of sufficiency. Such an indictment is "certain to a common intent:" *Stephen v. State*, 11 Ga. 225 (1852); *Com. v. Ramsey*, 1 Brewster (Pa.), 422 (1867); *State v. Wimberly*, 3 McCord (S. C.), 190 (1825); *Sherbon v. Com.*, 8 Watts (Pa.), 212 (1839); *U. S. v. Fero*, 18 Fed. R. 901 (1883), and *In re McDonald*, 33 Pacif. Rep. (Wyo.) 19 (1893).

In *Lamberton v. State*, 12 Ohio, 282 (1842), Mr. Justice Birchard, in delivering the opinion of the court, said (p. 284): "It is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offence charged. That it should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet; of the act done, which it behooves him to controvert, and so that the court,

applying the law to the facts charged against him, may see that a crime has been committed. A contrary doctrine would deprive the accused of one of the means humanely provided for the protection of innocence." And this decision was followed in *Smith v. State*, 21 Neb. 552 (1887).

It is thus seen that the defendant must ordinarily be charged with some particular offence, and not with being an offender in general. To this rule, however, there are

some marked exceptions, as indictments against a common scold: *Stratton v. Com.*, 10 Metcalf (Mass.), 217 (1845); a common barrator, *Com. v. Davis*, 11 Pick. (Mass.) 432 (1831); and the keeper of a common bawly-house, *Com. v. Pray*, 13 Pick. (Mass.) 362 (1832). In such cases the offence may be charged in general terms: 1 Chitty Crim. Law, 230, and Bouvier's Law Dict., 701.

C. PERCY WILLCOX.

NOTE BY E. C. RHODES, Esq.

The principal case brings up the question of particularity in indictments.

The general rules regarding particularity in indictments are substantially as follows:

"The degree of particularity necessary in setting out the offence can best be determined by examining the objects for which such particularity is required. These objects may be specified as follows:

(a). In order to identify the charges, lest the grand jury should find a bill for one offence and the defendant be put upon his trial for another.

(b). That the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds.

(c). To warrant the court in granting or refusing any particular right or indulgence, which the defendant claims as incident to the nature of the case.

(d). To enable the defendant to prepare for his defence in particular cases, and to plead in all; or, if he prefer it, to submit to the court by demurrer whether the facts alleged (supposing them to be true), so

support the conclusion of the law, as to render it necessary for him to make any answer to the charge.

(e). To enable the court, looking at the record after the conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment.

(f). To instruct the court as to the technical limits of the penalty to be inflicted.

(g). To guide a court of error in its action in revising the record."

Wharton's Criminal Practice, 166.

Indictments formerly were drawn so as to include much which would clearly be improper to-day as being evidence. This was due to the fact that the presentment of the grand jury was formerly not only an accusation involving a *prima facie* case against the defendant, but practically an adjudication of facts from which the defendant acquitted or purged himself by the "Ordeal," or, though rarely by combat or witnesses.

After time had modified the old procedure in the modern minuteness and particularity of statement remained. We have examples of this in modern times.

For instance, the indictment in the Webster-Parkman case charged Dr. Webster in four counts, with the murder of Dr. Parkman, the method being varied in each, and the last being as follows: "That the said John W. Webster, at Boston, aforesaid, in the county aforesaid, in a certain building known as the Medical College, there situate, on the 23d day of November last past, in and upon the said George Parkman, did feloniously, willfully, and of malice aforethought, make an assault, and him, the said George Parkman, in some way and manner, and by some means, instruments and weapons to the jurors unknown, did then and there feloniously, willfully, and of malice aforethought, deprive of life so that he, the said George Parkman, then and there died."

Mr. Justice STEPHEN, in his *History of the Criminal Law of England*, comments thus on the necessity of particularity in indictments:

"I do not think that anything has tended more strongly to bring the law into discredit than the importance attached to such technicalities as these. As far as they went their tendency was to make the administration of justice a solemn farce. Such scandals do not seem, however, to have been unpopular. Indeed, I have some doubt whether they were not popular, as they did mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law.

"There was a strange alteration in the provisions of the law upon this subject, by which irrational advantages were given alternately to the Crown and to the prisoner, In favor of the prisoner it was pro-

vided that the most trumpety failure to fulfil the requirements of an irrational system should be sufficient to secure him practical impunity for his crime. On the other hand, in favor of the Crown, it was provided that the prisoner should not be entitled to a copy of the indictment in cases of felony, but only to have it read over to him slowly, when he was put up to plead, a rule which made it exceedingly difficult for him to take advantage of any defect. But then again, any person might point out such a flaw, and it was in a sort of a way the duty of the judge, as counsel for the prisoner, to do so. On the other hand, some flaws were and others were not waived by pleading to the indictment.

"In short it is scarcely a parody to say that from the earliest time to our own days the laws relating to indictments was much as if some small portion of the prisoners convicted had been allowed to toss up for their liberty.

"The rule that the indictments must set out all the elements of the offence charged, was some sort of security against the arbitrary multiplication of offences and extensions of the criminal laws by judicial legislation in times when there were no definition of crimes established by statute, or, indeed, by any generally recognized authority. If, for instance, it had been lawful to indict a man in general terms, say for high treason, and if the judges had had to say what constituted high treason, the law might have been stretched to almost any extent. The necessity for setting forth that the prisoner imagined that the death of the king, and manifested such imagination by such and such overt acts, was a

considerable security against such an extension of the law, though, as the history of the crime of treason will show, it was not a complete one. The same principle was illustrated by indictments for libel in the latter part of the last century, and even in our own days instances may be found in indictments for conspiracy in which laxity of pleading might have had serious consequences to the accused. The fact is that looseness in the legal definitions of crimes can be met only by strictness and technicality in indictments, and that indictments may be reduced with perfect safety to perfect simplicity as soon as the law has either been codified or reduced to certainty by authoritative writings which practically supply the place of a code."

The history and the general rule relating to particularity in indictments lead us to the main question involved in the principal case, namely, the effect of statutory provisions providing that indictments are sufficient when the charge is stated in the words of the statute.

It is natural, under such provisions,

to expect the prosecution to give the defendant as little knowledge of the details of the crime charged as possible, and for the defendant to claim a liberal interpretation of his constitutional rights. Around this contest the cases naturally arrange themselves.

The statute cannot override the defendant's constitutional right to be "informed of the nature and cause of the accusation," V. Amendment to Federal Constitution, and similar provisions exist in all state constitutions: Penna. Art. 1, § 9. All statutes must be interpreted in view of this right of the defendant.

It is clear that the defendant is entitled to something more than to be charged with a crime in the words of the Act, for instance, an indictment charging that John Jones "had unlawful carnal knowledge of a woman forcibly and against her will" would be to charge the crime in the words of the Act of Assembly of Pennsylvania defining the crime of rape, but to draw a good indictment, the prosecution would have to allege the name of the person ravished and the time and place.

CASES IN WHICH THE INDICTMENT HAS BEEN HELD INSUFFICIENT THOUGH IN THE WORDS OF THE ACT.

False Pretences.—*Com. v. Mulholland*, 14 U. S. 245. Indictment for false pretences quashed because the pretences were not set out.

Forgery.—*Com. v. Mulholland*, 5 W. N. C. 208. Indictment for forgery must show that the written instrument was calculated to defraud. Judge Thayer said: "Nor is the defect of this indictment aided by the 19th section of the same Act, which declares that 'It shall be sufficient in any indictment for forging, offering, disposing

of, or putting off any instrument whatever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with the intent to defraud, without alleging the intent of the defendant to defraud any particular person.' It is sufficient under this section to charge a general intent to defraud instead of charging an intent to defraud a particular person, but the charge must, nevertheless, contain all the necessary elements of a

criminal offence, and must set forth an instrument in its nature and upon its face of a character to injure some one, or must show this by averment of extrinsic facts. It was not intended to say that every indictment charging forgery, which alleges that the act was done with intent to defraud, should be sufficient. As well there might be said that, under the language of the same section, every indictment charging the offence of obtaining property by false pretences, which alleges that the act was done with intent to defraud, is sufficient—a proposition which was distinctly repudiated by the Supreme Court in *Com. v. Frey*, 14 Wright, 245, where it was expressly ruled that such an indictment in order to be good, must set forth particularly what the false pretences were."

Judge Thayer further says in the same case:

"This section of the Criminal Procedure Act was not intended to authorize a loose method of criminal pleading, by which an accused person might be put upon trial upon general, vague, indefinite, and insufficient charges, but only to compel him to make his objections to the indictment before the trial instead of afterwards, and this is the construction which has been put upon it by this court, in *Com. v. Galbraith*, 6 Phila. Rep. 281, and by the Supreme Court in *Com. v. Frey*, 14 Wright, 249."

People v. Foote, 52 N. W. 1036 Mich. (1892):

Variance between complaint and warrant not fatal when complaint contained the truth.

Asking defendant of criminal acts when under cross-examination.

Perjury.—*Walker v. State*, 11 So. R. 401 (Ala.): Indictment which

alleges proceeding in which oath was taken, name of officer before whom taken, his authority to take it, its falsity and materiality. *Rivers v. State*, 12 So. R. 434, Ala. (1893): Indictment for perjury must state the facts falsely sworn to, and the officer or court before whom or in which the offence was committed. Indictment charging that defendant did corruptly give or offer to give \$3 with intent to induce him to commit a certain crime punishable as felony, to wit, the crime of perjury, was insufficient. *Williams v. Com.* 91 Pa. 493 (1879): Indictment for perjury. Oath was set out. Motion to quash denied, but Bill of Particulars granted, Justice Trunkley saying: "In simplifying the indictments it was not the intention to make their brief and comprehensive terms a cover for snares to be sprung upon the accused." *Grattan v. State*, 71 Ala. 244 (1892): Not sufficient to follow words of statute unless the indictment alleges the fact in doing or not doing of which the offence consisted.

Offences against the Liquor Laws.—U. S. Statutes, 96 U. S. 360: Indictment for illegal distilling. Defendant was charged with procuring to be used, a still. *Held*, that the party who used the still should be named. "The accused must be apprised with reasonable certainty of the accusation against him . . . an indictment not so framed is defective although it may follow the language of the statute." *State v. Stephen*, 12 So. R. 383; *Seifried v. Com.* 101 Pa. 200: Indictment under general liquor law, act committed in a locality having a special prohibitory status. Indictment held insufficient.

Offences against the Post Office

Law.—U. S. r. Hess, 124 U. S. 204: Indictment for "scheme to defraud . . . by means of the post office establishment of U. S." Indictment in words of statute insufficient.

Blasphemy.—Undegraff v. Com. 11 S. & R. Pa. 410: In an indictment for blasphemy, words complained of should be set out. Com. v. Preuner (Anarchist Case), Q. B. Phila., December Term, 1891, No. 494, M. S. S.

Slander.—Davis v. State, 22 S. W. 979, Texas (1893): Information for slander described words spoken in presence of P. Complaint had stated them as being spoken in presence of G. *Held*, variance.

Libel.—Miles v. State, 11 So. R. 403, Ala. (1892): An affidavit which does not charge an offence, does not authorize the issue of a warrant and subsequent prosecution. Defendant tried for defamation. Affidavit that defendant "maliciously spoke . . . imputing the commission of a felony by J. W. R." While in the words of the act the statute does not prescribe with definiteness the constituents of the offence. "The defendant has the

constitutional right to demand the nature and cause of his accusation, so that he may identify the particular charge and offence." *Turnipseed v. State*, 6 Ala. 666; *Anthony v. State*, 29 Ala. 28; *Beasley v. State*, 18 Ala. 335; *Grattan v. State*, 71 Ala. 344; *Carter v. State*, 55 Ala. 181; *Later v. State*, 225 W. 110 (Tex.); 15 Criminal Law Mag., pages 750-56.

Murder.—Little v. State, 33 N. E. R. 417 (1893), Ind: Indictment for murder in words of statute. *Held*, bad as not giving circumstances. Citing: *State v. Record*, 56 Ind. 307; 10 Amer. & Eng. Ency. 322; 1 West Criminal Practice, 399-600; *Shepherd v. State*, 54 Ind. 25; *Howard v. State*, 67 Ind. 401; *Thomas v. Com.* 20 S. W. 226, Kentucky (1892).

Larceny.—State v. Van Cleave, 32 Pac. R. 461 (Washington): Name of owner material. Amendment not allowed. *McCowan v. State*, 22 S. W. 955 Ark. (1893): Indictment for larceny charging theft of two jackets owned by "Connecrey & Co.," names of firm not stated. *Held*, insufficient. E. C. R.

DEPARTMENT OF COMMERCIAL LAW.

EDITOR-IN-CHIEF,

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H. GORDON MCCOUCH, CHAS. C. BINNEY, CHAS. C. TOWNSEND,
FRANCIS H. BOHLEN, OLIVER BOYCE JUDSON.BRASS AND IRON WORKS CO. v. PAYNE.¹ SUPREME COURT
OF OHIO.*Goodwill—Partnership—Sale—What passes—Firm name—Right to use.*

1. The goodwill of a partnership is a part of the property of the firm; and when, on a dissolution of the partnership, one of the partners transfers to the others all his interest in the firm business and assets, with the understanding that they are to succeed to the business of the old firm, such sale carries with it the vendor's interest in the goodwill.

2. The firm name is part of this goodwill, and the right to use it accordingly passes to the purchasing partners; and when the contract of sale reserves to the retiring partner no right with respect to that name, he cannot lawfully use it in a business of a like kind, carried on by him in the vicinity subsequent to such dissolution.

3. In a proper case a court of equity will perpetually enjoin such unlawful use of the firm name by the retiring partner.

GOODWILL AS PARTNERSHIP PROPERTY.

1. *Its nature and incidents.*—(a). According to Lord Eldon, in *Cruttwell v. Lye*, 17 Ves. 335, it is "nothing more than the probability that the old customers will resort to the old place." *Moreau v. Edwards*, 2 Tenn. Ch. 347. Others have defined it as "the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on;" *England v. Downs*, 6 Beav. 269. The probability that

the business will continue in the future as in the past: *Bell v. Ellis*, 33 Cal. 620. Every possible advantage acquired by the firm in carrying on its business, whether connected with the premises or the name, or other matters: *Gineal v. Cooper*, 14 Ch. D. 596; *Farwell v. Huling*, 132 Ill. 112; and see *Pay v. Pay* (N. J.), 6 Atl. Rep. 12. The favor which the management of a business wins from the public, and the probability that old customers will continue their patronage: *Chit-*

¹Reported in 33 N. E. Rep. 86.

Lenzen v. Witbeck, 30 Mich. 401; S. C., 15 N. W. Rep. 526. And the probability that its old customers will continue their custom and commend it to others: *Myers v. Kalamazoo Bugry Co.*, 34 Mich. 215.

These definitions, however, are only partial. While it is true that the main business of a firm is securing customers, and then serving them, it is equally clear that the valuable element of the goodwill is that which attracts the customers. That is, that in order to properly define goodwill, we must go back of the vague generalizing which speaks of it as the probability of securing the old customers, and specify the causes which create that probability. It is true that in so doing we are going beyond the proper bounds of a definition, for these causes are legion; but nothing else can give an adequate idea of what goodwill really is. Accordingly, the description given by Mr. Justice STONE, in his work on Partnership (7th Ed.), § 99, is far preferable to any of those previously cited. "This goodwill," he says, "may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Yet this, too, is too bulky to be of practical use: and what more does it amount to than

that the goodwill of a business is the right to succeed to it, or to carry it on as the successor of the old firm? This last definition, it is contended, covers every material point, and does away with a great deal of the haze which, as we shall see, still clings around the subject.

(δ). The sources of goodwill being so various, it is evident that it must be an open question whether, in a given case, it is an incident of the trade of the premises on which it is carried on, or of the personnel of the firm; and that that question can only be settled on the special circumstances of the case. It has been said that the general rule is to regard the goodwill as an incident of the premises: *Rawson v. Pratt*, 91 Ind. 9; *England v. Downs*, 6 Beav. 269; *Austen v. Boys*, 2 DeG. & J. 626; S. C., 4 Jur. N. S. 721; *Bergamini v. Bastian*, 35 La. An. 60; *Elliott's App.*, 60 Pa. 161. And there are many cases in which this would be true, as in case of a tavern or a hotel: *Elliott's App.*, *supra*. Or where business and premises are both leased: *Chittenden v. Witbeck*, 30 Mich. 401; S. C., 15 N. W. Rep. 526; *Chissum v. Dewea*, 3 Run. 29; *Mitchell v. Reed*, 19 Hun. (N. Y.) 418; S. C., 84 N. Y. 556. But when the business is carried on independently by the firm, and the premises only are leased, it certainly seems the better opinion to hold the goodwill an incident of the trade: *Succession of Jean Journé*, 21 La. An. 391.

A good instance of the absurd results to which the strict application of this rule would lead, is to be found in *Austin v. Boys*, 2 DeG. & J. 626; S. C., 4 Jur. N. S. 721, where it was gravely ruled that goodwill, being connected with place, was inapplicable to the busi-

ness of a solicitor, which has no local existence, but is purely personal, depending on the trust and confidence which persons may repose in the integrity and ability of the solicitor to conduct their legal affairs. But why should they not repose the same confidence in his integrity and ability to select a proper successor? At any rate, the validity of the sale of the business of a professional man (except a clergyman, who is too apt to have no good will to dispose of), is too well settled to be called in question; and nothing but the goodwill can pass by such a sale, unless we are to assume that the vendee was too innocent to know that he pays an exorbitant sum for the mere material subjects of the contract.

Goodwill, then, does not necessarily depend exclusively on locality. it may also depend, to some extent, on the personal qualities of the proprietor of the business; and though this is a matter very difficult to transfer, there seems to be no doubt that it can be done, figuratively at least, in such a way that the vendee can reap some benefit from it; and that is all that any sale of goodwill amounts to. It is equally clear that it may depend upon the nature of the trade, in certain instances, as where certain patents are owned by the firm, or it has the reputation of making a certain brand of goods; and this is especially true in modern times, when goods are sent to such distances for sale. It makes no difference to the man who wants a Winchester rifle, a Remington type-writer, or a Danton saw, whether those articles are made in Massachusetts, Pennsylvania, or Patagonia. What difference, then, could

locality make if the right to make and sell those goods were to be sold?

(c). But whether dependent on person, trade, or place, the goodwill of a business is a valuable property right: *Potter v. Comra*, 10 Exch. 147; *Senter v. Davis*, 38 Cal. 450. It is part of the assets of a business: *Wallingford v. Burr*, 17 Neb. 137. It is part of the assets of a decedent: *Succession of Jean Journe*, 21 La. An. 391, and must be accounted for by his personal representative. If an executor conducts the business as his own, he is chargeable with the value of the goodwill; but that goodwill does not include the right to use the name of the decedent: *Randell's Est.*, 8 N. Y., Suppl. 652. It is equally a part of partnership property: *Hell v. Ellis*, 33 Cal. 622.

Goodwill may be the subject of a contract of sale: *Carruthers v. McMurray*, 75 Iowa, 173, but only in connection with the business, of which it is an incident. It cannot be sold apart from that business, either by judicial sale, or otherwise. A mortgage of the "machinery, type, presses, cases, furniture, paper, forms and tools of a newspaper company, together with the goodwill" of its business, cannot be foreclosed as to the goodwill, after all the tangible property covered by the mortgage has been alienated, worn out, or destroyed, and the corporation has become consolidated with another newspaper corporation: *Met. Natl. Bk. v. St. L. Dispatch Co.*, 36 Fed. Rep. 722.

A misrepresentation in regard to the goodwill of a business is, when the two are sold together, material and fraudulent: *Cruce v. Penner*, 39 Cal. 336. And when the con-

tract for the sale of the stock and goodwill of a business is an entirety, the vendor cannot relieve himself from liability for fraud in respect to the goodwill by proving the stock to be worth the full amount paid: *Herfort v. Cramer*, 7 Colo. 483.

If the right conveyed by a sale of the goodwill of a business be unlawfully taken away and destroyed, the law will award a compensation, as in case of injury to any other right; and this rule is applicable to the issuing of an attachment on the stock in trade in a case growing out of the sale of stock and goodwill, whereby customers were kept away: *Carey v. Gunnison* (Iowa), 17 N. W. Rep. 881.

One who has paid for the goodwill of a business cannot recover the price paid on the ground that the goodwill was not vendible: *Buckingham v. Waters*, 14 Cal. 146.

As goodwill can be sold, it can also be mortgaged, assigned, or taken in execution, in connection, of course, with the business to which it is incident: *Met. Nat'l Bk. v. St. L. Dispatch Co.*, 36 Fed. Rep. 722; *Putter v. Comra*, 10 Exch. 147; *Walker v. Mottram*, 19 Ch. D. 355; *Hudson v. Osborne*, 39 L. J. Ch. (N. S.) 79. But not if dependent solely upon the personal skill of the proprietor: *Cooper v. Met. Board of Works*, 25 Ch. D. 472.

II. Sale of Goodwill.—As the sale of the goodwill of a business practically amounts to giving up to the vendee the right of the old firm to deal as such with its old customers, and whatever new ones may be attracted by its special advantages, the only tangible right that the vendee acquires is that of

holding himself out as the successor of the old firm; and to that extent only, it would seem, the law, in the absence of special circumstances, will protect him. This is what seems to be meant by the expression in *Bradford v. Peckham*, 9 R. I. 250, that goodwill is the goodwill as the vendor used it, and only coextensive with the business carried on. Accordingly, the sale of a trade or business, with the goodwill, does not prevent the vendor from setting up again in a similar trade or business, without an express covenant, or fraud in inducing the vendee or others to believe that he would not engage in the same again, or the like: *Crutwell v. Lye*, 17 Ves. 335; *Shackle v. Baker*, 14 Ves. 468; *Churton v. Douglas*, 1 Johns. (Eng.) Ch. 174; *Davies v. Hodgson*, 25 Beav. 177; *Bergamini v. Bastian*, 35 La. An. 60; *Bassett v. Percival*, 5 Allen (Mass.), 345; *Hoxie v. Chaney*, 143 Mass. 592; *Rupp v. Over*, 3 Brewst. (Pa.) 133; *Moreau v. Edwards*, 2 Tenn. Ch. 347; *Washburn v. Doruch* (Wia.), 32 N. W. Rep. 551. But though the sale of goodwill does not take away the vendor's right to engage in the same business again, it does preclude him from interfering actively with the benefits and advantages of the business sold; and he therefore has no right to hold himself out as the successor of the old firm, or as continuing its business: *Hudson v. Osborne*, 39 L. J. Ch. (N. S.) 79; *Dwight v. Hamilton*, 113 Mass. 173; *Smith v. Gibbs*, 44 N. H. 335; *Hall's App.*, 60 Pa. 458. Nor (though there is some difference of opinion on this question), has he a right to directly solicit trade from the customers of the old firm; although there would seem to be

no reason against his doing so by general advertising, and he can certainly deal with them if they come unsolicited: *Ginesi v. Cooper*, 14 Ch. D. 596, as modified by *Leggott v. Barrett*, 15 Ch. D. 306; S. C., 43 L. T. N. S. 641; *Labouchere v. Dawson*, 13 L. R. Eq. 322, as modified by *Walker v. Mottram*, 19 Ch. D. 355, and *Pearson v. Pearson*, 27 Ch. D. 145.

The vendor may, however, bind himself by express covenant or agreement not to engage in the same business again within a certain area or time; and this restriction, if reasonable, will bind him: *Howard v. Taylor*, 90 Ala. 241; *Morgan v. Perhamus*, 36 Ohio St. 317; *Thompson v. Andrews (Mich.)*, 41 N. W. Rep. 683. But he may engage in business outside of the limitation, or at the expiration of the time, and, it has been held, may solicit his old customers, though this hardly seems consonant with sound reasoning: *Hanna v. Andrews*, 50 Iowa, 462.

Conveying, as it does, the exclusive right of succession to the business of the old firm, the sale of the goodwill carries with it as incidents whatever is necessary to effectuate that right, as the trade-marks and trade-name of the former firm: *Levy v. Walker*, 10 Ch. D. 447; *S. C. (C. A.)*, 48 L. J. Ch. (N. S.) 273; *Caswell v. Hazard*, 2 N. Y. Suppl. 783; *Drake v. Dodsworth*, 4 Kans. 159; *contra*, *Lewis v. Smith*, 8 Pa. C. R. 327. This rule is especially applicable to the case of a newspaper. "The goodwill of a newspaper establishment often constitutes its largest value. A majority of the subscribers are generally permanent. They become attached to the paper on account of its sentiments, whether political,

religious, or literary, and the ability and energy with which it is conducted. The habit of reading a particular paper periodically seems to stimulate a desire for its continuance. Subscribers, once obtained, are permanent customers, not only for the paper, but for advertising and job work:" *Boon v. Moss*, 70 N. Y. 465.

The goodwill which merely pertains to the place of business, however (whatever that may be), does not carry with it the right to use the firm name: *Morgan v. Schuyler*, 79 N. Y. 490. And no sale of goodwill can carry with it the right to use a firm name, which is the individual name of the vendor, without an express agreement to that effect: *Churton v. Douglas*, 1 Johns. (Eng.) Ch. 174; *Thynne v. Shore*, 45 Ch. D. 577; *Howe v. Searing*, 6 Bow. (N. Y.) 354; *Vonderbaak v. Schmidt (La.)*, 10 So. Rep. 615. Yet in such a case the vendor, though at liberty to engage in business again, as we have seen, may not use his own name again in such a way as to lead others to believe that his is a continuation of the old business: *Churton v. Douglas*, *supra*.

There is no substantial difference between a sale of goodwill made by a trader himself, and a forced sale, on execution or by an assignee; and the rules previously laid down apply equally to the latter class of sales: *Hudson v. Osborne*, 39 L. J. Ch. (N. S.) 79, with perhaps the single exception, which seems to be founded on a true equity, that a forced sale will not preclude the passive vendor from soliciting his old customers, if he again engage in business: *Walker v. Mottram*, 19 Ch. D. 355.

It has been ruled that a sale of a

business, without any mention of goodwill, does not carry the latter; but that can only be true when there are circumstances to show that the assets of the business only were included in the sale: *Hebert v. Dupaty*, 42 La. An. 343; S. C., 7 So. Rep. 580; *Costello v. Eddy*, 12 N. Y. Suppl. 236; S. C. aff. 128 N. Y. 650; 39 N. E. Rep. 146. The proper presumption would seem to be that the goodwill is included in the sale, at least where the assets are not worth the price paid, or where lists of customers are included: *Boon v. Moss*, 70 N. Y. 465. But this reduces it to a mere question of fact in every case.

III. *Goodwill of Partnership*

Firmus.—The goodwill is an asset of the partnership: *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Hall v. Barrows*, 10 Jur. (N. S.) 55; *Reynolds v. Bullock*, 47 L. J. Ch. (N. S.) 773; S. C., 26 W. R. 678; *Reil v. Ellis*, 33 Cal. 620; *Williams v. Wilson*, 4 Sandf. Ch. 379; *Brass & Iron Works Co. v. Payne* (the principal case), (Ohio) 33 N. E. Rep. 88. In pursuance of the old notion that partnership was akin to joint tenancy, it was formerly held in England that it went to the surviving partner: *Hammond v. Douglas*, 5 Ves. 539; *Crawshaw v. Collins*, 15 Ves. 218; *Lewis v. Langdon*, 7 Sim. 421. But that relic of antiquity is now destroyed, and it is acknowledged everywhere that it does not survive, but forms a part of the general assets of the partnership: *Wedderburn v. Wedderburn*, 22 Beav. 84; *Smith v. Everett*, 27 Beav. 446; *Holden v. McMakin*, 1 Para. Eq. Cas. 270; *Dougherty v. VanNostrand*, 1 Hoff. Ch. 68. And if one partner appropriates it on the dissolution of the firm by death, he will either be en-

joined from so doing, or be made to account for it: *Willett v. Blamford*, 1 Hare, 253; *Rammelsberg v. Mitchell*, 39 Ohio St. 22. But he may retain it, upon payment of its full value: *Shepard v. Boggs*, 9 Neb. 257.

Where the partnership is kept secret, and the business conducted in the name of the accounting partner, there is no goodwill to account for (which goes to prove the contention that goodwill depends very little on place): *Smith v. Wood*, 12 N. Y. Suppl. 724. And the same would seem to be true where the business expires by its own limitation, or by agreement, each partner having the right to compete for the business of the old firm: *Hall v. Hall*, 20 Beav. 139; *Van Dyke v. Jackson*, 1 E. D. Smith (N. Y.), 419; *Lobeck v. Lee* (Neb.), 55 N. W. Rep. 690; *Muselman's App.*, 62 Pa. 81; *Rice v. Angell*, 73 Tex. 350; *contra*, *Binninger v. Clark*, 10 Abb. (N. Y.) Pr. (N. S.) 264. This rule may be changed by express agreement between the partners, either in the articles of partnership, or otherwise: *Turner v. Major*, 3 Giff. 442. And there are certain businesses, as the publication of a newspaper, in which the goodwill is so important a factor in the value of the partnership property that the rule would not justly apply: *Dayton v. Wilkes*, 17 How. (N. Y.) Pr. 510.

As in other cases, the sale of the interest of one partner in the goodwill of the business to another, does not prevent the retiring partner from setting up in the same business; but it does confer on the purchasing partner the exclusive right to represent himself as the successor of the old firm, and the retiring partner may not lawfully do

any act tending to mislead others into the belief that he is such successor, or that the purchasing partner is not: *Smith v. Everett*, 27 Beav. 446; *Leggott v. Barrett*, 15 Ch. D. 306; S. C., 43 L. T. (N. S.) 641; *Cottrell v. Babcock Printing Press Mfg. Co.*, 54 Conn. 122; *White v. Jones*, 1 Abb. (N. Y.) Pr. (N. S.) 328; *Moody v. Thomas*, 1 Disney (Ohio), 294; *Williams v. Farrand* (Mich.), 50 N. W. Rep. 446; *Brass & Iron Works Co. v. Payne* (Ohio) (the principal case), 33 N. E. Rep. 88. The same rule holds good as to a surviving partner: *Davies v. Hodgson*, 25 Beav. 177; *Johnson v. Holliday*, 2 DeG. J. & S. 446. But the retiring partner may bind himself not to engage in business, or interfere with the other's trade: *Dethlefs v. Tanisen*, 7 Daly (N. Y.), 354; *Hollis v. Shafer* (Kana.), 17 Pac. Rep. 86.

Partners who have sold out their interest in the goodwill of a business to a co-partner will be restrained from carrying on a rival establishment under a name so similar to that of the first as to mislead and draw off business: *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215. So, when two partners had sold to a third their share of the property of the partnership, and their interest in the goodwill of the business, and had agreed in writing not to do anything which should in any wise impair or injure the said interest in the goodwill; but thereafter engaged in the same business and competed with the vendee, but did not specially solicit trade, it was held that an injunction would issue to restrain them from soliciting, doing, or obtaining business from any of the customers of the old firm, and from doing anything

to impair or injure the said interest in the goodwill: *Angier v. Webber*, 14 Allen (Mass.), 211. But this is not now law to the extent indicated; and upon the present state of authority they could only be restrained from soliciting the old customers, or otherwise actively impairing the value of the goodwill.

On a bill filed by one of the partners to wind up the partnership, a receiver will be appointed to carry on the business, if necessary to preserve the goodwill: *Marten v. Van Schaick*, 4 Paige (N. Y.), 479.

As a rule, the sale by one partner to another of all the partnership property, with the understanding that the purchasing partner is to succeed to the business of the old firm, carries with it the goodwill as an incident: *Brass & Iron Works Co. v. Payne* (Ohio) (the principal case), 33 N. E. Rep. 88. The firm name, being part of the goodwill, passes by a sale thereof, and becomes the exclusive property of the purchasing partner: *Burckhardt v. Burckhardt*, 42 Ohio St. 474; *Brass & Iron Works Co. v. Payne* (Ohio), *supra*.

These rules do not always hold good, however, and are largely dependent on circumstances: *Reeves v. Denicke*, 12 Abb. (N. Y.), Pr. (N. S.) 92; *Howe v. Searing*, 6 Bosw. (N. Y.) 354; S. C., 10 Abb. (N. Y.) Pr. 264.

One partner can bind the other by a sale of the goodwill, as of any other item of partnership property: *Moreau v. Edwards*, 2 Tenn. Ch. 347.

IV. *Its Value*.—The value of the goodwill of a business, of course, cannot be shown with certainty: *Burckhardt v. Burckhardt*, 42 Ohio, St. 474. It is dependent upon the

business it represents: *Byrne v. Stewart*, 124 Pa. 450. And is to be calculated by estimating every advantage secured by succeeding to the business, without reference to the exclusion of any person from

engaging in the same business: *Rammelsberg v. Mitchell*, 29 Ohio, St. 22. In one case, it was assessed at one year's average net profits: *Mellersh v. Keen*, 28 Benv. 453.
R. D. S.

DEPARTMENT OF COMMERCIAL LAW.

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WILMOTH v. HENSEL.¹ SUPREME COURT OF PENNSYLVANIA.

Reward—How Earned—Validity of Contract—Who liable.

1. A reward offered for the prosecution and conviction of persons who violate any of the statutes against bribery or corruption at elections, is earned by procuring the prosecution, followed by a plea of not guilty, of a tax collector who issued false tax receipts. The fact that sentence was suspended is not material, the word conviction being construed in its popular and not its technical sense.

2. It is not against public policy to offer a reward for the conviction of offenses thereafter committed against election laws, nor is such a contract without consideration, if acted on in good faith. The *bona fides* of such a transaction, where the evidence is conflicting as to whether or not the plaintiff induced the commission of the crime in order to procure the reward, is for the jury.

3. When defendant, as chairman of a state political committee, signed and published an offer of reward for the conviction of persons who should violate the election laws, and subsequently, at a public meeting, declared that he had \$1000 to pay for such a conviction, the question as to his personal liability on the offer is for the jury.

REWARDS.

1. How the Contract is Formed.—

A reward, which is a promise, made usually by public advertisement, either to a particular person or persons, or to any or all persons, to pay a certain sum of money to one who will perform certain services

enumerated in the offer, belongs to the class of conditional contracts, and no liability arises upon it until it is made complete by acceptance and performance of its conditions.

No special form is necessary to the validity of such a contract. In

¹ Reported in 131 Pa. St. 200; 31 W. N. C. 237; 25 Atl. Rep. 86.

fact, rewards are usually offered by public advertisement, as said above, either by means of newspapers or of handbills; but as such an offer seems to create a contract at common law, and not one within the Statute of Frauds, there would seem to be no reason why it may not be equally valid if merely a verbal offer: *Hynes v. Williams*, 1 Moore, P. C. (U. S.) 154; *Reif v. Paige*, 55 Wis. 496; S. C. 42 Am. Rep. 731.

When once communicated to the public, the contract is complete upon the compliance of any one with its terms, and the offeror is liable upon it: *Brigg's Case*, 15 Ct. of Cl. 48; *McLeod v. Meale*, 77 Cal. 87; S. C. 19 Pac. Rep. 189; *Pierston v. Morch*, 82 N. Y. 302. It is not necessary that the one who accepts and acts upon the offer should give the offeror notice of his intention so to do: *Harrison v. Pike*, 16 Ind. 140; *Reif v. Paige*, 55 Wis. 496; S. C. 42 Am. Rep. 731.

The offeror need not be personally interested in the matter concerning which the reward is offered: *Furman v. Parke*, 21 N. J. L. 310. An agent may offer a reasonable reward for the recovery of property belonging to his principal; and if he offer an excessive one, the person who receives the property may recover a reasonable sum as compensation: *Gibb's Case*, 14 Ct. of Cl. 544. The burgesses of a borough may lawfully offer a reward for the detection and punishment of a criminal, as it is really the state acting through them: *Borough of York v. Forscht*, 23 Pa. St. 391. But the officers of a town (in New England) cannot do so: *Gale v. Berwick*, 31 Me. 174; *Abel v. Pembroke*, 61 N. H. 357. Nor of a county in Oregon: *Mountain v. Multnomah Co.*, 16 Oreg. 279; S.

C. 18 Pac. Rep. 464. But an offer of a reward, made by the mayor, will bind the town, if ratified by the city council, which represents the whole body of the inhabitants: *Crawshaw v. Roxbury*, 7 Gray (Mass.), 374.

These cases depend on local laws, however, and it is reasonably certain that in most of the United States, municipal corporations can offer rewards for the arrest and punishment of criminals, and for other matters of public concern.

The offeror may prescribe any conditions he pleases: *Arpus v. Conner*, 43 Ark. 337. And may withdraw his offer at any time before performance: *Ryer v. Stockwell*, 14 Cal. 134; *Biggers v. Owen*, 79 Ga. 658; S. C. 5 S. R. Rep. 193; *Shuey v. U. S.*, 2 Otto (92 U. S.) 73. But if the offer stands and its declared conditions are performed, it makes no difference that the results do not meet the private expectations of the offeror. His secret motives form no part of the contract: *Kashling v. Morris*, 71 Tex. 584; S. C. 9 S. W. Rep. 739.

The offer need not in all cases be actually communicated to the public. It would seem to be sufficient if it be published where the public might have access to it. Thus, when the governor officially signed a proclamation offering a reward for the apprehension and delivery to the proper jailer of a fugitive from justice, and it was entered on the executive journal, the offer was held complete without further publication: *Auditor v. Ballard*, 9 Bush. (Ky.) 272; S. C. 15 Am. Rep. 728.

Such an offer, when acted upon, is not a *nudum factum*. The performance of its conditions is a good consideration: *Ryer v. Stockwell*, 14 Cal. 134; *Janvris v. Exeter*, 48

N. H. 83; Furman v. Parke, 21 N. J. L. 310.

It is a mooted question whether or not it is essential that the performance of the services should be made with a knowledge of the offer and with a view to obtaining the reward. Some cases have held that these are essential, as without them there can be no mutuality between the parties: Hewitt v. Anderson, 36 Cal. 476; S. C. 38 Am. Rep. 65; Chic. & Alton R. R. v. Sebring, 16 Ill. App. 181; Lee v. Trustees, 7 Dana (Ky.) 28, (but see Auditor v. Ballard, *infra*); Furman v. Parke, 21 N. J. L. 310; Fitch v. Smedaker, 38 N. Y. 248; Howland v. Lounds, 51 N. Y. 604; S. C. 10 Am. Rep. 654. But several well-considered cases hold that neither knowledge nor intention is essential; and that it is sufficient, if the services be in fact performed: Williams v. Carwardine, 4 B. & Ad. 621; S. C. 5 C. & P. 566; Gibbons v. Proctor, 64 L. T. N. S. 594; S. C. 7 T. L. R. 462; 55 J. P. 616; Eagle v. Smith, 4 Houst. (Del.) 293; Dawkins v. Sappington, 26 Ind. 199. "Would the benefit to the State be diminished by a discovery of the fact that appellee, instead of acting from mercenary motives, had been actuated solely by a desire to prevent the escape of a fugitive and to bring a felon to trial?" Auditor v. Ballard, 9 Bush. (Ky.) 572; S. C. 15 Am. Rep. 728. On strict legal principles, perhaps, the former opinion is the better; but the man, who arrests a criminal, or recovers stolen property, has certainly some equity to the reward offered, which courts that proceed on equitable principles ought to respect.

The offer of a reward is not of unlimited duration. It is good only

for a reasonable time. In Loring v. Boston, 7 Mete. (Mass.) 409, it was held to have expired after the lapse of three years and eight months; but in Re Kelly, 39 Conn. 159, it was held that the offer was not barred by the lapse of nearly three years, but held good until the statute of limitations had run against the crime.

It is not against public policy to offer a reward for the detection and conviction of future offenses: Wilmoth v. Hensel (the principal case), 151 Pa. St. 200; S. C. 31 W. N. C. 237; 25 Atl. Rep. 86.

II. *Performance of Conditions.*

—Before one is entitled to a reward, he must show that he has fully complied with the conditions of the offer: Arnes v. Conner, 43 Ark. 337; Nall v. Proctor, 3 Mete. (Ky.) 447; Goldborough v. Cratie, 28 Md. 477; Com. v. Edwards, 10 Phila. (Pa.) 215; Shuey v. U. S., 2 Otto (92 U. S.) 73; Jones v. Phoenix Bank, 8 N. Y. 228. A reward for information that will lead to the arrest and conviction of a criminal is not earned until the trial and conviction are brought about: Ryer v. Stockwell, 14 Cal. 134. When an arrest is the consequence of the criminal's surrendering himself to justice, the one who arrests him on such surrender cannot claim a reward offered for information leading to his conviction: Bent v. Union Bank, 4 C. P. D. 1. So, when a reward was offered for the arrest of a fugitive and his delivery to a certain jail, and A. arrested him and delivered him to a magistrate, by whom he was put in the custody of a constable, where he remained until he was tried and acquitted, it was held that A. had not earned the reward: Clanton v. Young, 11 Rich. (S. C. L.) 546. A

mere imparting of information or suspicion will not earn a reward offered for an arrest and conviction: *Burke v. Wells, Fargo & Co.*, 50 Cal., 218. Information gained by one not entitled to claim a reward (a public officer), and by him communicated to another, on whose advice the criminal confessed to him and the officer together, and a conviction was had on that confession, was held not to entitle such person to the reward: *Dunham v. Stockbridge*, 133 Mass. 233. Information, which merely tends to create suspicion, without enough to justify the arrest of the suspect, will not entitle to a reward offered for the arrest of the offender: *Austin v. Supervisor*, 24 Wis. 279.

A fortiori the claimant cannot recover, if the necessary services, or a part of them, were not, in fact, performed by him: *Sanderson v. Lane*, 43 Mo. App. 158; *County of Juniata v. McDonald*, 122 Pa. St. 115; 8 C. 15 Atl. Rep. 696; *Adair v. Cooper*, 25 Tex. 348, or were performed without any intention of claiming the reward: *Fallich v. Barber*, 1 M. & S. 108. A reward for information that will lead to arrest and conviction, does not intend information given in casual conversation, but such as is given with a view to its being acted on, either to the person offering the reward, or his agent, or to an officer with authority to arrest; not to a third person with no duty or interest in the premises: *Lockhart v. Barnard*, 14 M. & W. 674. When a "liberal reward" was offered for information leading to the arrest of a fugitive from justice and a specific sum for his arrest, the "liberal reward" was held due upon the giving of the information required, but not the specific sum, unless the

arrest was in fact made by the claimant or his agents: *Shuey v. U. S.*, 2 Otto (92 U. S.) 73.

The services must be performed in good faith; an unauthorized arrest of a defendant out on bail will not earn a reward: *Marking v. Needy*, 8 Bush, (Ky.) 22. A reward is not earned by an arrest of runaways, if the claimant knew they were returning: *Goldsborough v. Crallie*, 28 Md. 477. One who assists in the escape of a prisoner, and withholds that fact cannot recover a reward for information leading to his recapture: *Haasan v. Doe*, 38 Me. 45. So, one who actually aids in concealing and maintaining a fugitive, and finally surrenders him on an express agreement with him that he should be given a portion of the sum received as a reward, is not entitled to it: *Bledsoe v. Jackson*, 4 Sneed. (Tenn.) 429. And an informer cannot recover a reward for recovery of stolen goods, if he had them in his possession, knowing them to be stolen, or was, in any way, connected with the felony: *Jenkins v. Kelren*, 12 Gray (Mass.) 330. But it would seem that a receiver can recover a reward for information leading to the arrest of the thieves: *Tarner v. Walker*, 6 R. & S. 871; 8 C. 1 L. R. Q. B. 641; *Aff.*, 2 L. R. Q. B. 241; 8 B. & S. 314. Where the evidence is conflicting as to whether or not the plaintiff procured the commission of the crime with a view to obtaining the reward, the question of his good faith is for the jury: *Wilmoth v. Hensel* (the principal case), 151 Pa. St. 200; 8 C. 31 W. N. C. 237; 25 Atl. Rep. 86.

According to one case, a reward offered for the arrest of two persons is not recoverable *pro tanto* on the

ment of one: *Blain v. Pac. Exp. Co.* (Tex.), 6 S. W. Rep. 679. But this rule would hardly extend to the case of lost or stolen property, in view of the cogent reasoning in *Hyman v. Prazier*, 6 Mass. 344, where a reward had been offered for the recovery of a parcel of lost bankbills, and the court held the finder of part entitled to a *pro tanto* reward. "Any other consideration would be extremely mischievous in its effects, and would in most cases tend to convert an honest finder of lost or stolen property into a fraudulent concealer of it. For when an honest man in low circumstances, encouraged by an advertisement like that in the present case, and having bestowed his time and labor in searching for and restoring lost property, shall find that, by accident or previous fraud, part of the property has disappeared, and that by law his diligence and fidelity are to pass wholly without reward, the temptation to convert the whole to his own use might be too strong to resist: for in most cases a detection would be difficult, if not impossible. It is, therefore for the interest of the owner, and certainly tends to secure the integrity of the finder, that whenever any proportion of the property is found and actually restored, under circumstances which leave no doubt of the faithfulness and integrity of the finder, this latter should have such part of the reward which may have been offered as will be proportionate to the property so restored."

But a reward offered for the return of "lost" property cannot be recovered if it was not in fact lost in the legal sense of the word. If one dealing with a bank accidentally leaves his pocketbook on a desk in the banking-room, and

publishes an advertisement describing it as lost and promising a reward for its return, another who, while dealing at the bank, discovers and takes it is not entitled to the reward, as it was never lost in the eye of the law, being in the custody of the bank: *Kincaid v. Eaton*, 98 Mass. 139.

It is not necessary, in order to earn a reward, that its conditions be literally complied with; a substantial compliance is all that is required. If a criminal, arrested on suspicion, afterwards confesses, such confession will entitle the one who secured it to a reward offered for procuring information: *Smith v. Moore*, 1 C. R. 438. When a reward was offered for the delivery of an escaped prisoner at a certain place, and two persons arrested him and were taking him thither, when they were intercepted, and the prisoner demanded of them by the sheriff of the county in which they then were, to whom they surrendered him, giving notice that they claimed the reward, it was held that they had earned it: *Stone v. Dysert*, 20 Kans. 123. So, where conviction is a condition of the reward, the latter is earned, though the conviction is prevented by the dismissal of the indictment at the instance and request of an attorney employed by the offeror to prosecute: *R. R. v. Goodnight*, 10 Bush. (Ky.) 552; 8 C. 19 Am. Rep. 80; though an order is procured arresting judgment, or discharging the prisoner, after a verdict of guilty: *Buckley v. Schwartz*, 83 Wis. 304; 8 C. 53 N. W. Rep. 511; or though the verdict of guilty is followed by a suspension of judgment: *William's Case*, 12 Ct. of Cl. 192; *Wilmoth v. Hemel* (the principal case), 151 Pa. St.

300; S. C. 31 W. N. C. 237; 25 Atl. Rep. 86.

A reward is earned when the guilty person is pointed out, though he had an accomplice: *Gilkey v. Bailey*, 2 Harr. (Del.) 359; when the criminal is convicted, though the conviction could not have been had without his own confession: *Crawshaw v. Roxbury*, 7 Gray (Mass.) 374; and a reward for "detection" is earned by giving information that leads thereto: *Brennan v. Hoff*, 1 Hill. (N. Y.) 151; *Beane v. Dyer*, 9 Allen (Mass.) 151.

The services need not be performed in person; they may be performed through an agent: *Co. of Montgomery v. Robinson*, 83 Ill. 174; *Pruitt v. Miller*, 3 Ind. 16; and when information is required, it need not be given to the offeror. It is sufficient if it be given to one with authority to receive and act on it: *Lancaster v. Walsh*, 4 M. & W. 16.

III. *Who is Entitled to Reward.*

—This depends, in the first instance, on the wording of the offer. As the offeror may prescribe what terms he pleases, he may restrict his offer to a particular class of persons, or to a particular person. But even in such a case it has been held that one not within the terms of the offer may become entitled to the reward, if his services are accepted and made use of by the offeror: *Bank v. Hart*, 55 Ill. 62.

When the offer is general, however, anyone (with one exception, to be noted hereafter) may perform the services required, and so become entitled to the reward: *Cummings v. Gann*, 52 Pa. St. 484. If more than one do so, the first only is entitled to it: *Lancaster v. Walsh*, 4 M. & W. 16. See *Thatcher v. England*, 3 C. B. 254. One who

assists another in performing the services cannot recover a proportionate part of the reward without an express promise to share it with him: *Stroud v. Garrison*, 24 Ark. 53. But several persons may make an agreement to apportion a reward, when recovered, between them, and in such a case one who receives the whole reward will be liable to each of the others for his proportion, in an action for money had and received: *Dawson v. Gurley*, 22 Ark. 381.

The owner of a stolen horse, who pursues and captures the thief, is entitled to the statutory reward given by Acts Penna., Mich. 15, 1821 (P. L. 90): *Co. of Butler v. Leibold*, 107 Pa. 307. An employé of a railroad company may earn a general reward offered by it: *Chic. & Alton R. R. Co. v. Sebring*, 16 Ill. App. 181; and an infant who performs the required services may maintain an action to recover the reward on attaining his majority: *Morris v. Kurling* (Tex.), 15 S. W. Rep. 226.

The exception to the rule that anyone who performs the services required may earn a general reward is, that a public officer may not do so when the services lie in the line of his duty. Any offer to compensate him for doing that duty is against public policy, and void; and his performance of the services creates no contract between him and the offeror: *R. R. v. Grafton*, 51 Ark. 304; S. C. 11 S. W. Rep. 702; *Re Russell*, 51 Conn. 577; S. C. 30 Am. Rep. 55; *Means v. Hendershott*, 24 Iowa 79. This rule has been applied to constables: *Hayden v. Souger*, 56 Ind. 42; S. C. 26 Am. Rep. 1; *Exp. Gore*, 57 Miss. 251; *Smith v. Whilldin*, 10 Pa. St. 39; *Gilmore v. Lewis*, 12 Ohio 261; policemen: *Kick v. Merry*, 23 Mo.

71; *Thompson v. Mo. Pac. Ry.*, 42 Mo. App. 34; sheriffs: *Rea v. Smith*, 2 Eandly (Ohio), 193; *Stamper v. Temple*, 6 Humph. (Tenn.), 113; deputy sheriffs: *Warner v. Grace*, 14 Minn. 487; chiefs of police: *Day v. Ins. Co.*, 16 Minn. 408; watchmen: *Pool v. Boston*, 5 Cush. (Mass.) 220; customs officers: *Davis v. Burns*, 5 Allen, (Mass.) 352; and overseers of the poor: *Ring v. Devlin* (Wis.), 32 N. W. Rep. 121. Even a private person, who applies for and receives from a sheriff a warrant and special deputation to arrest a fugitive from justice, becomes a deputy thereby, and cannot recover a reward for the arrest: *Malpass v. Caldwell*, 70 N. C. 130. But if the warrant was illegal, or otherwise conferred on him no authority to make the arrest, he can still claim the reward: *Hayden v. Souanger*, 56 Ind. 42; 8 C. 26 Am. Rep. 2.

This exception does not apply, however, where the services are outside of the officer's line of duty: *Engelhard v. Davidson*, 11 Ad. & El. 856. As where a fugitive from one State is arrested without process by an officer of another State: *Morrell v. Quarles*, 35 Ala. 544. Or even by an officer of another county: *Davis v. Munson*, 43 Vt. 676; 8 C. 5 Am. Rep. 315. A constable temporarily suspended does not act in the line of his duty in securing evidence to convict a criminal: *Smith v. Moore*, 1 C. B. 438. It is no part of the duty of a municipal officer to leave his city and county, and prosecute an offender in another county: *Bronenberg v. Cohn*, 110 Ind. 169; 8 C. 11 N. E. Rep. 29. It is not the duty of an officer to make an arrest without warrant for an offence not committed in his view, and

without legal complaint made against the party arrested: *Kasling v. Morris*, 71 Tex. 584; 8 C. 9 S. W. Rep. 739; *Russell v. Stewart*, 44 Vt. 170. So, when a sheriff of a county in New York pursued a fugitive to Illinois, and there arrested him under a requisition, it was held that he did not receive process in Illinois as sheriff, that he made the arrest as a private citizen, that the fact that he was sheriff, or that the requisition described him as such, added nothing to his authority, and that he was entitled to the reward: *Gregg v. Pierce*, 53 Barb. (N. Y.) 387. But see *Malpass v. Caldwell*, 70 N. C. 130. And, similarly, a fireman can recover a reward for rescuing a body from a burning building, as it is no part of his duty to risk his life in the service: *Reif v. Paige*, 55 Wis. 496; 8 C. 42 Am. Rep. 731.

A reward for the arrest of "any one who has killed another, and is fleeing or attempting to flee before arrest" is earned by a private person, who arrests a criminal who has escaped from arrest by another private person: *Wilson v. Wallace*, 64 Miss. 13; 8 C. 8 So. Rep. 128; but not when he has escaped from an officer: *Candler v. Itawamba Co.*, 62 Miss. 194.

IV. *Liability on Offer*.—There is sometimes a doubt as to whether the offer of a reward creates a personal liability. If offered by a private individual, acting for himself, it undoubtedly does so; but where it is offered by a public officer, or by a person acting as the agent of another, it depends wholly upon the authority of the offeror to bind his principal by such an offer. An agent may bind his principal by offering a reward for the recovery

of property: *Gibb's Case*, 14 Ct. of Cl. 544. And a railroad superintendent, without express authority, may bind the company by the offer of a reward for the arrest of persons offending against its property rights: *Cent. R. R. & Bkg. Co. v. Cheatham*, 85 Ala. 292; 8 C. 4 So. Rep. 828. But whether an offer of a reward by the chairman of a political committee binds him personally is a question for the jury: *Wilmoth v. Hensel* (the principal case), 151 Pa. St. 200; 8 C. 31 W. N. C. 237; 25 Atl. Rep. 86.

Public officers, however, must show clear authority to bind the municipality; and if they do not, they will be personally liable, although they make the offer under their official designation: *Prentiss v. Farnham*, 22 Barb. (N. Y.) 519; *Freeman v. Boston*, 5 Metc. (Mass.) 56; *Brown v. Bradlee*, 156 Mass. 28; *Borough of York v. Forscht*, 23 Pa. St. 391; *Lee v. Trustee*, 7 Dana (Ky.), 28.

In general an offer of a reward is to be construed as the public would understand it, and not with strict technicality: *Fargo v. Arthur*, 43 How. Pr. (N. Y.) 193; *Wilmoth v. Hensel* (the principal case), 151 Pa. St. 200; 8 C. 31 W. N. C. 237; 25 Atl. Rep. 86. Whether it applies to past offences, or future, or both, is to be gathered from the wording of the particular offer: *Cent. R. R. & Bkg. Co. v. Cheatham*, 85 Ala. 292; 8 C. 4 So. Rep. 828; *Cornelson v. Ins. Co.*, 7 La. An. 343; *Baltimore v. Ins. Co.*, 22 La. An. 318; *Freeman v. Boston*, 5 Metc. (Mass.) 56; *Loring v. Boston*, 7 Metc. (Mass.) 409; *Re Kelly*, 39 Conn. 159.

Although the finder of lost property has no claim to a reward, if none has been offered: *Watts v.*

Ward, 1 Oreg. 86; *Wentworth v. Day*, 3 Metc. (Mass.) 352; *Nicholson v. Chapman*, 2 H. Bl. 254; only to be reimbursed his necessary expenses in keeping it: *Amory v. Myllyn*, 10 Johns. (N. Y.) 102; yet if a reward has been offered, the finder has a lien on the property to the amount of the reward, and can retain it until the reward is paid: *Wentworth v. Day*, 3 Metc. (Mass.) 352; *Cummings v. Gann*, 52 Pa. St. 484. But no lien is implied when the offer is merely of a "liberal reward": *Wilson v. Guyton*, 8 Gill. (Md.) 213. If the finder has sued for the reward and recovered judgment, he can still retain the property until the judgment is paid, and the owner cannot replevy it: *Rverman v. Hyman*, 3 Ind. App. 459.

When two persons claim a reward, it is held in England that it is not a proper case for an interpleader: *Collis v. Lee*, 1 Hodges, 204; but in New York, that it is: *Fargo v. Arthur*, 43 How. Pr. (N. Y.) 193.

When a reward has been earned by one person, but paid to another through fraud or mistake, an action will lie to recover it from the wrongful receiver: *Stephens v. Brooks*, 2 Bush. (Ky.) 137, but not assumpsit for money had and received; for there is no privity between them: *Sergeant v. Stryker*, 16 N. J. L. 464.

When an offer of a reward for arrest or information is in the disjunctive, and one person arrests and another gives the information required, the offeror must pay each a sum equal to the reward offered: *Per Ld. Kenyon*, in *Ernst's Case*, 3 Went. Plead. 30.

When the claimant did not know at the time that a reward had been

offered, any sum accepted by him in return for the services performed will be considered as in satisfaction thereof: *Marvin v. Treat*, 37 Conn. 96.

V. *Prædictæ*.—A reward need not be declared on specially, but may be recovered on a general *indebitatus assumpsit*: *Bank v. Hart*, 55 Ill. 62. The declaration must show that the plaintiff has performed the conditions of the offer: *Codding v. Mansfield*, 7 Gray (Mass.), 272. To recover on a reward for arrest and conviction, the plaintiff must allege that he was instrumental in procuring the conviction, not merely that the criminal was convicted: *Furman v. Parke*, 21 N. J. L. 310;

Morris v. Kasling (Tex.), 15 S. W. Rep. 26. The record of conviction is evidence that the claimant has earned the reward: *Brown v. Bradlee*, 156 Mass. 28; overruling on this point *Mead v. Boston*, 3 Cosh. (Mass.) 404. The Statute of Limitation does not begin to run against a claim for a reward until it has been earned by full performance: *Ryer v. Stockwell*, 14 Cal. 134.

[NOTE.—“People are very ready to offer rewards for the discovery of offenders whilst smarting under the loss or injury they have sustained, but are slow indeed to pay them when the claimants present themselves.” C. J. Tindal, in *Smith v. Moore*, 1 C. B. 458.]

R. D. S.

NOTES AND COMMENTS ON RECENT DECISIONS.

In the February number of the *AMERICAN LAW REGISTER AND REVIEW*, in a note to *Railway Co. v. Spencer*, the English cases of *Rayner v. Preston*, and *Castellain v. Preston*, were cited and discussed. I think that *Rayner v. Preston*, is good law in New York, and ought to be good law everywhere.

Castellain v. Preston, I am not very well satisfied with. In the first place, its conclusion is not demonstrated to be consistent with the doctrine of indemnity. It proceeds upon the notion that the value of the property at the time of the fire, must be the same as its value at the time of the execution of the executory contract to sell. This may not have been so. There was in that case a two year period within which to exercise option to complete sale. But a more serious objection is this. An executory contract to sell a house and lot in future is not a present sale, and, until the time comes for closing title, the vendor, who is still the owner, would seem to have the right to reap the advantage of pending contracts with third parties relating to his property. When the time for closing title arrives, the vendee is entitled to receive substantially what he has contracted for. If the house has meanwhile burned down, or has been substantially injured or destroyed by fire, it does not seem to me that the vendee is legally obligated to take the property under the usual executory contract of sale.

And this position is not without warrant of authority, and has been expressly held in New York. *Listman v. Hickey*, N. Y. Law Journal, p. 1249, Feb. 20, 1892; *Smith v. McCluskey*, 45 Barb. 610; *Goldman v. Rosenberg*, 116 N. Y. 78; *Smyth v. Sturges*, 108 N. Y. 492. If the vendee chooses to complete the purchase, he does so because he considers the property still worth the purchase price. If the

vendor cannot compel a purchase, there is no legal right in his favor to form a basis for subrogation in favor of the insurance company. Moreover, the rule in *Castellain v. Preston*, would not work well in practice. To compel the parties to a future executory contract to complete as matter of legal obligation when both of them prefer to cancel before the time for closing would be manifestly inconvenient. But if the law permitted them to cancel their executory contract, they would, by consent, do this upon the occurrence of the fire, in order to compel the insurers to pay the loss, provided, *Castellain v. Preston*, were good law. After cancelling the subsisting contract of sale, a new contract of the same tenor and effect might immediately be substituted under which it could not be claimed that the insurance company would have any right of subrogation to the purchase price.

The insurance contract is, in its terms, an agreement to pay to the vendor the cash value of his property destroyed. The starting point and presumption should be, that the contract is to be enforced according to its express terms unless a clear consideration of public policy intervenes, and where the assured has respected the doctrine of the necessity of an insurable interest at the time of the issuance of the policy, and also during its entire life it is hardly worth while to press the doctrine of indemnity any further. According to *Castellain v. Preston*, the insurers may receive premiums for nothing, though no condition of the contract has been violated by the insured; and this result is in itself inequitable.

The strict doctrine of indemnity has for convenience been abandoned in the law of life insurance on this account. Nor is it uniformly applied in the law of fire insurance in accordance with the rigid rules laid down in *Castellain v. Preston*. In proof of this, many cases might be cited from the English and American reports: *Blackstone v. Alemahnia Ins. Co.*, 56 N. Y. 104; *Mut. Safety Ins. Co. v. Hone*, 2 Comst. (N. Y.) 235; *Collingridge v. Royal Exchange Ins. Co.*, 3 Q. B. D. 173; *Seymour v. Vernon*, 21 L. J. Ch. 433; *Burnard v. Rodocanachi*, 7 App. Cas. 333, 339.

In fact, in *Castellain v. Preston*, the learned justices seem to

be avowedly struggling throughout their opinions with the many legal obstacles with which they have to contend.

A contract to sell in future is not a sale within the meaning of the policy: *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176; *Hill v. Cumberland Valley M. P. Co.*, 59 Penn. St. 474.

And until title passes, it is convenient to consider the vendor's relations to his insurance contracts undisturbed.

GEORGE RICHARDS,

New York, February 13, 1894.

CASES ON WILLS.

As cosmopolitan habits increase in popularity, the decisions upon the probate of foreign, or partially foreign wills and codicils, become of greater importance, particularly where the will of the testator is contained in more than one document. The question of incorporations in the probate of separate documents, has frequently troubled the courts, especially the probate of separate and distinct wills disposing of property in a different country from that in which the general will of the testator is offered for probate. The Probate Division of the High Court of Justice in England, were recently confronted with a most peculiar state of facts, *In re Goods of Tampai* [1894] P. 39. Testator domiciled in England, left a will with two codicils, disposing of his property in England and Russia, and also two other instruments, one a will, revoking all previous dispositions so far as they related to his real property in Russia, and appointing separate executors of that property. All the executors and trustees united in applying for probate in England of the five instruments. The Russian will was not executed in accordance with Russian law, and it was hoped that, if admitted in England, the domicile of the testator, the probate might be recognized in Russia as covering the realty. The court refused to allow the will relating to the Russian real property to be included in the probate, since that would be the same as saying that a will dealing only with English personalty, and a will dealing only with English realty, ought both to be

admitted to probate, because, forming together a disposition of the whole property of the testator. No case, it was asserted, could be cited to that effect. The point, however, was regarded as important, and an appeal probable. In the cases where the courts have not insisted upon the probate of all the separate testamentary papers, they have done so as a concession to the convenience of the parties in interest: *In the Goods of Astor*, 1 P. D. 150. A concession in the case of *the Goods of Tampui*, would have been a matter of great practical convenience, certainly it has been the invariable custom to require some memorandum to be attached to the general will probated of the document relating to the foreign goods, so that any one looking at the probate may be at once apprised of the existence of such other paper.

The well established rule in Pennsylvania that no testator is presumed to die intestate as to any part of his property, if the words of the will can be construed to carry the whole, is forcibly illustrated and confirmed in *Reimer's Estate*, 28 Atlantic, 186. The clause in dispute contained the words, "I give to my brother Andrew all my household goods, books, clothing, furniture, etc., that he may desire. The balance of the personal effects to be divided among the children of my sister." The Orphans' Court decided that the words "balance of personal effects," referred only to the goods mentioned in the bequest to Andrew, and did not include a large residue of personal property, consisting of cash and securities. This decision the Supreme Court has reversed, giving the clause the broadest possible construction, and the word, "effects," the widest possible meaning, holding in fact, that the sentence is residuary in its character. Justice Dean, in dissenting, took the view that the words, personal effects, were restricted by the context, and that the intentions of the deceased could be plainly ascertained.

In cases of the construction of ambiguous phrases in wills, arguments from precedents are nearly useless, for no two cases are alike. The maxim that no testator is presumed to die intestate as to a part of his goods, if the words will carry the whole is so often and so triumphantly quoted in recent deci-

sions, that it may be regarded as a ready and useful *Deus ex machina* for relieving a distracted bench.

The Supreme Court of Errors of Connecticut, has had occasion, in the recently reported *In re Barber's Estate*, 27 Atlantic, 973, to consider the ever recurring question of testamentary capacity and the exhaustive character of the opinion delivered will, it is to be hoped, not only end the discussion in that state, but also be of service in other jurisdictions. The court had to dispose of a wordy and ponderous charge to the jury, containing statements to the effect that the burden of proof lies in every case, and remains throughout the trial upon the proponents of the will. That the burden upon the proponents is not that of proof by a fair preponderance, but by such evidence as brings certainty to the minds of the jury. And that to defeat a will on the ground that it is the product of an insane delusion, the jury should be satisfied by a preponderance of evidence of the existence and effect of such a delusion. These statements were certainly calculated to confuse a jury. The Supreme Court, however, reviews the whole subject of the burden of proof in cases involving testamentary capacity, finding an irreconcilable conflict of views and opinions. The present tendency is to hold that, on formal proof of capacity by the attesting witnesses, the burden of proof upon the proponents has been discharged, and thereafter rests upon the party alleging incapacity. If the opinions of the attesting witnesses are favorable, the court concludes, the contestant will go forward with affirmative evidence of insanity, and proponent will rebut, there being always a presumption in favor of sanity, which must be counterbalanced by a preponderance of evidence. It is hardly necessary to discuss the deplorable situation of the proponent, should the opinions of the attesting witnesses prove unfavorable. The interesting topics touched upon in this case are hypothetical questions, expert testimony and the admissibility of letters addressed to testator and found among his papers.

W. H. LOVD.

SOME RECENT CASES ON RAILROAD LEASES.

Whatever may be the advantages of railroad consolidation from an economic point of view the tendency of legislation and judicial decision is to limit it as far as practicable. The object, of course, is to prevent the growth of monopolies, by hindering the formation of systems of railroads which will virtually control vast regions of country to the exclusion of all competition. There are numerous constitutional and statutory provisions which forbid the consolidation of parallel and competing lines; and the courts are always ready to scrutinize closely any attempt at consolidation where there is no legislative authority for it. The rule seems to be that, where a railroad company is granted a franchise, intended in a large measure to be exercised for the public good, the due performance of its franchise being the consideration of the public grant, any contract which disables the corporation from performing those functions, without the consent of the state, and transfers to others the rights and powers conferred by the charter, relieves the grantee of the burden which the charter imposes, is a violation of the contract with the state, and is void as against public policy. This rule was applied in the very recent case of *Earle v. Seattle, L. S. & E. Ry. Co.*, 56 Fed. Rep. 909 (June, 1893), where a railroad company organized under the laws of Washington, attempted to consolidate with another company by a traffic agreement, which involved the surrender of the entire control and management of its affairs for its legal lifetime. Under the laws of Washington a railroad company has no authority to transfer its franchise except by sale and conveyance and lease in a manner prescribed by the statute. The court held that the traffic agreement was involved and should be set at the suit of the minority of the stockholders.

In *Stockton, Attorney General v. Central R. R.*, of New Jersey, 24 Atl. Rep. 964 (1892), the court approved the doctrine that even where a railroad company was given the power to lease, that power impliedly, from the character of railroad corporations as *quasi* public bodies, was limited to

leases designed for the public welfare, and did not warrant a lease in furtherance of a scheme to prevent competition, and create a monopoly. The decision of the case did not turn upon this proposition, but the lease complained of was set aside, because it had been made to a foreign corporation, for which there was not only no legislative authority but an actual legislative prohibition.

In Oregon, where there is no statute which authorizes either expressly or by implication a railroad lease, such lease has been held absolutely void: *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 145 U. S. 52. See also on this subject *Hamilton v. Savannah F. & W. Ry. Co.*, 49 Fed. Rep. 412.

Statutory prohibition against leases of competing lines are strictly construed against companies which attempt to evade them. Thus in *Hafer v. Cincinnati H. & D. R. Co.*, 29 Wkly. Law Bul. (Ohio) 68 (1892), it was held that a railroad was competing within the meaning of the Ohio statute, though the competing points were reached by trackage arrangements with other lines. In *Hamilton v. Savannah, F. & W. Ry. Co.*, 49 Fed. Rep. 412, it was held that the purchase of one railroad by another was illegal under the constitutional provision which forbade one corporation to make any contract with another tending to defeat or lessen competition in their respective business. If a railroad company is authorized to lease another railroad connected with it, the authority must be restricted to railroads that are finished: *Pittsburg & Connelville R. R. v. Bedford & Bridgeport R. R.*, 32 P. F. Smith (Pa.), 104.

Legislative authority to make a traffic arrangement with another railroad does not imply a power to lease. In *St. Louis V. & T. H. R. R. Co. v. Terre Haute & I. R. R. Co.*, 12 S. Ct. 953 (1892), it appeared that an Indiana statute, authorized any railroad company of Indiana "to intersect, form and unite" with any railroad of an adjoining state constructed to the state line, and "to make such contracts and agreements with any such road . . . for the transportation of freight and passengers, or for the use of its road, as to the board of directors may seem proper. The court held that this

statute did not authorize one railroad corporation to lease its road to another.

In *Thomas v. West Jersey R. R.*, 101 U. S. 71, it was held that, where a railroad company is authorized to make contracts with other corporations and individuals for transporting or conveying passengers and merchandise, it cannot make a lease to three individuals by which all its rights and duties are transferred to them for twenty years.

ALBERT B. WEIMER.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to William Draper Lewis, Esq. 728 Drexel Building, Philadelphia, Pa.]

THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, being a series of lectures delivered before Yale University. By JOHN F. DILLON, LL.D. Boston: Little, Brown & Co., 1894.

THE POLITICAL ECONOMY OF NATURAL LAW. By HENRY WOOD. Boston: Lee and Sheppard, Publishers, 10 Milk Street, 1894.

PARLIAMENTARY TACTICS FOR THE USE OF THE PRESIDING OFFICER AND PUBLIC SPEAKERS, Arranged by HARRY W. HOOT. New York: Scientific Publishing Co., 1893.

STATE LIBRARY BULLETIN. Legislation No. 4. January. Comparative Summary and Index of State Legislation in 1893. Albany: University of the State of New York, 1894.

A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, Adapted to the Laws of the Various States with an Appendix of Forms. By ALLEN M. MURRILL. Revised by JAMES L. BISHOP. Sixth Edition. Revised by JAMES AVERY WEBB. New York: Baker, Voorhis & Co., 1894.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by T. E. and E. E. BALLARD. Vol. II, 1893. Crawfordsville, Ind.: The Ballard Publishing Co., 1893.

A TREATISE ON THE LAW OF PARTNERSHIP. By THEOPHILUS PARSONS, LL.D. Fourth Edition. Revised and enlarged. Boston: Little, Brown & Co., 1893.

A TREATISE ON THE LAW OF BUILDING AND BUILDINGS, especially referring to Building Contracts, Leases, Easements and Liens, containing also Various Forms Useful in Building Operations, a Glossary of Words and Terms commonly used by Builders and Artisans, and a Digest of the Leading Decisions on Building Contracts and Leases in the United States. By A. PARLETT LLOYD. Second Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY. By LEONARD A. JONES. Fourth Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

FORMS IN CONVEYANCING AND GENERAL LEGAL FORMS, comprising Precedents for Ordinary Use, and Clauses Adapted to Special and Unusual Cases. With practical notes. By LEONARD A. JONES.

Fourth Edition. Revised, with appendix containing recent statutory changes. Boston and New York: Houghton, Mifflin & Co., 1894.

A TREATISE ON THE LAW OF QUASI-CONTRACTS. By WILLIAM A. KREMER. New York: Baker, Voorhis & Co., 1893.

SYPHILIS IN THE INNOCENT (Syphilis Infantum). Clinically and Historically considered, with Plan for the Legal Control of the Disease. By D. DUNCAN BULKLEY, A.M., M.D. New York: Bailey & Fairchild, 1893.

REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE. A treatise adapted to use in all the States and Territories where that system prevails. By JOHN NORTON POMEROY, LL.D. Third Edition. Edited by JOHN NORTON POMEROY, JR., A. M. Boston: Little, Brown & Co., 1894.

AMERICAN RAILROAD AND CORPORATION REPORTS, being a Collection of the Current Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago: R. B. Myers & Co., 1893.

BOOK REVIEWS.

BERING SEA TRIBUNAL OF ARBITRATION. Opinions of Mr. Justice HARLAN at the Conference in Paris. Washington, D. C.: Government Printing Office, 1893.

When the Bering Sea Tribunal of Arbitration rendered its final decision at Paris on the fourteenth of last August, a resolution was adopted permitting each individual Arbitrator to file with the Secretary of the Tribunal a separate opinion upon the matters submitted to it for determination, and a period of several months was allotted for this purpose. One of the opinions filed under this resolution was written by Justice HARLAN of the Supreme Court of the United States, who was one of the two Arbitrators representing our Government in the Tribunal of Arbitration, and this opinion has been recently published by the Government Printing Office at Washington. The earlier part of the volume contains some remarks which Justice HARLAN made in private conference with the other Arbitrators, in support of the two propositions that the Tribunal was invested with authority under the Treaty of February 29, 1892, between Great Britain and the United States, first, to adopt regulations which, for a certain period in each year, should *entirely prohibit* pelagic sealing and not merely restrict it; and second, to extend these regulations not only to Bering Sea, but also to the North Pacific. It is of interest to note that Justice HARLAN's views on both of these points were adopted unanimously by the Tribunal of Arbitration, and subsequently were embodied in their decision.

The second of the two parts into which this volume is divided contains a formal opinion by Justice HARLAN upon the merits of the entire controversy. Of the five questions of law submitted to the Tribunal of Arbitration for determination, the first four related to certain extraordinary rights of marine

jurisdiction which, it was alleged, the United States derived from Russia at the time of the purchase of Alaska. It is a noteworthy fact that the opinion of Justice HARLAN upon these four points was in accordance with that of the majority of the Arbitrators (Senator Morgan only dissenting), and was *adverse* to the claims of the United States. Justice HARLAN held in substance that by the Ukase of 1821 Russia did *not* assert any jurisdiction over Bering Sea except for a distance of 100 miles from the coast, and that this jurisdictional claim was never enforced in practice, but on the contrary was withdrawn as to the United States by the Treaty of 1824, and as to Great Britain by the Treaty of 1825. He held further, in answer to the second point, that Great Britain never recognized or conceded any claim by Russia of exclusive jurisdiction in Bering Sea, or over the seal fisheries, outside of territorial waters; and, in answer to the third point, that when in the Treaty of 1825 Russia conceded to the citizens of Great Britain full rights of fishing and of navigation in the "Pacific Ocean," this phrase included Bering Sea, and the Ukase of 1821 was thereby rescinded so far as it might be regarded as affecting the present question. The fact that Justice HARLAN felt constrained to concur with the foreign members of the Tribunal in deciding these questions adversely to the United States may be regarded as a proof of the most positive kind that the decision reached by the Arbitrators upon these points was correct.

With respect, however, to the fifth and last of the points submitted to the Tribunal of Arbitration, Justice HARLAN did *not* concur with a majority of the Arbitrators, and the present volume contains his dissenting opinion upon this question. A majority of the Tribunal decided that the United States had *not* a right of property in the fur seals when found beyond territorial limits, and that it could not lawfully protect the seals in the open sea. Justice HARLAN in his dissenting opinion maintains the opposite of both of these propositions. He contends that in international law, just as in the development of the common law, new cases which are lacking in direct precedents should be determined in accordance with

our sense of natural justice; and he quotes Kent and numerous other text writers in support of the view that there is an international morality underlying the principles of international law as they are being developed with the advance of civilization. He thinks that these principles can be deduced in many instances from analogies to be found in the municipal law of particular nations, and he traces a similarity between seals on the one hand, and such animals as bees, pigeons and deer, on the other hand, all of which were protected as private property by the Roman law and the common law of England, because of their having an *animus revertendi*. He asserts that the United States by maintaining and protecting the extensive breeding grounds of the seals on the Pribiloff Islands, at great expense, and for the purpose of making these animals subserve the interests of commerce and manufacture, has thereby exercised such control over them as would give to our Government a permanent right of property in the seal herd, even while temporarily absent from our territory upon the high seas. Justice HARLAN then discusses the question as to whether, assuming that the United States does not have a right of property in the seals, it can lawfully protect them from attack beyond its territorial limits, and reaches the conclusion that such protection is lawful upon the theory that it is an act of national self-preservation. He contends that a nation so protecting its lawful industries does not thereby appropriate to itself any part of the ocean, or interfere with the innocent use of the high seas for other purposes. It only prevents a form of wrong doing and preserves what no one has a right to destroy. He concludes his opinion by citing several striking precedents from the decisions of the United States Supreme Court, foreign treaties and other sources, which tend to establish the right of a nation to assert its sovereignty and defend its interests upon the high seas outside of the three-mile limit.

It is to be regretted on many accounts that the opinion of Justice HARLAN upon these points did not obtain the concurrence of a majority of the Tribunal, for it is almost impossible to read his able and lucid discussion of this question without

sharing his conviction that the United States does possess a right of property in the seals, and that it can lawfully protect that right. However, the contrary decision of the Arbitrators is of less importance than it otherwise would be for the reason that they established a set of regulations for the protection of the seals, which there is every reason to believe will fulfill the objects sought by the United States when the Treaty of Arbitration was signed. To these regulations Justice HARLAN gave his hearty concurrence. . . R. D.

A TREATISE ON EXTRAORDINARY RELIEF, IN EQUITY AND AT LAW. By THOMAS CARL SPELLING. Covering Injunctions, Habeas Corpus, Mandamus, Prohibition, Quo Warranto, Certiorari. Containing an exposition of the principles governing these several forms of relief, and of their practical use, with citations of all the authorities up to date. In two volumes. Boston, Mass.: Little, Brown & Co., 1893.

If well done the practical use of such a treatise as this before us goes without saying. The work is no modern digest in text book form. It presents the law on each subject in a clear and entertaining manner. Every principal is critically explained. The notes are complete and render the book of great practical value as a reference to pertinent cases. The principle merit of the work is found in the text. Ordinarily, modern text books seem to have been written by persons who consider that all that is necessary to write a law book was to take the syllabi of all the cases, which, by any possibility could be said to relate to the subject, and arrange them in some sort of logical or illogical order, putting in a word here and there to prevent the whole from appearing too strikingly what it really is—nothing but a digest. Digests on any subject are valuable, and have their place, but the class of work, like the one before us, which carefully explains the principles of the law which the cases illustrate, and makes a careful selection of the illustrations used, have infinitely more use, and are works of a great deal higher order.

The first volume is entirely devoted to injunctions. On

examining the index to this subject, which is printed separately from the index to the rest of the book, we could not find anything relative to injunctions to restrain strikes and property in the hands of receivers. This seems to us to be rather an important omission, if it has been omitted, and not overlooked by us. We would be interested to know how one, who seems to have so closely studied the general principles of injunctions, would regard this their new application. We also think Mr. SPELLING has lost an opportunity when he failed, critically, to discuss the question of injunctions to restrain libel. The discussion on this subject, which we find on page 710, Volume I, is good, but evinces a certain amount of timidity on the part of the writer in that he fails to point out irreconcilable cases. For instance, how can we reconcile the case of *Mauger v. Dick*, 55 How. N. Y., Pr. 132, in which it was said that an injunction does not lie to restrain a manufacturer of goods from issuing circulars to dealers in such goods charging that the plaintiff is offering for sale imitations of the goods and threatening prosecutions, with the case of *Springhead Spinning Company v. Riley*, L. R. 6 Eq., 551, where workmen were restrained from placarding notices advising their fellow workmen not to hire themselves to the plaintiff because there was a strike on in the plaintiff's shop. Again, how can we reconcile the former case with that of *Emack v. Kane*, 34 Fed. Rep. 46, where the defendants were restrained from issuing a circular in which they threatened to bring suit against the plaintiff for an infringement of patent. We point out these examples because we believe that they illustrate a very serious defect in a good work. What a lawyer wants, when he turns to a text book to aid him in preparing a brief, is either merely a digest to refer him to all the cases or a critical discussion of those cases. It does not seem to us that the half-way text book meets any real need. The text book, for instance, which merely states principles. A good digest does this, and illustrates those principles by more copious examples than we can hope to find in a text book which pretends to state principles and use cases as illustrations. We do not mean to say that Mr. SPELLING's work is in a position of being half way between

a digest and a critical discussion. It is much nearer a complete critical discussion of the subject with which he deals. Our only complaint is that in this critical discussion and development of the different subjects he has not gone quite far enough. He seems to have tried to reconcile authorities rather than to point out their irreconcilable elements. With all, however, it is an excellent book—far, very far, above the average text book which we have to review. Especially welcome is the discussion of the writ of *certiorari*, this being the only scientific discussion of this writ which we know of, a certain work labeled “*Certiorari*,” which was noticed in our columns some months ago, not being worth speaking of.

Volume II, besides containing *certiorari*, has a discussion of *habeas corpus*, *mandamus*, and *quo warranto*. This volume, from its very nature, is more interesting than Volume I. We have other good works on injunctions, but for the other subjects, Mr. SPELLING has probably written a work which is more useful than any other which we know of.

The paper and typography, like all other volumes, from the same press, are above criticism. W. D. L.

HOW TO USE THE FORCEPS. With an introductory account of the Female Pelvis and the Mechanism of Delivery. By HENRY G. LANDIS, A. M., M. D. Revised and enlarged by CHARLES H. BUSHONG, M. D. Illustrated. New York; E. B. Treat, Publisher, 5 Cooper Union.

Lord COKE has justly observed that in the ashes of the law lie buried the sparks of all sciences. The subject of malpractice must ever be one of interest and importance to practitioners of the law; and from this aspect the above entitled work will prove useful to lawyers, though, of course, its especial field of usefulness lies in the domain of medicine.

MARSHALL D. EWELL, M. D.

The Keok Law School of Chicago.

A PRACTICAL TREATISE ON NERVOUS EXHAUSTION (Neurasthenia), Its Symptoms, Nature, Sequences, Treatment. By

GEORGE M. BEARD, A. M., M. D., Edited with Notes and Additions by A. D. ROCKWELL, A. M., M. D. Third Edition—Enlarged. New York: E. B. Treat, Publisher, 5 Cooper Union. 1894.

This book is one which every brain-worker, and especially every lawyer, should read; not with the idea of becoming his own medical adviser, or of self treatment, but for the purpose of becoming acquainted with the symptoms of nervous exhaustion, so common among lawyers, and thereby avoiding danger.

Having been obliged almost entirely to suspend professional work for nearly three years we speak feelingly on this subject when we say that an ounce of prevention is better than a pound of cure. The greater part of the evil effects of nervous exhaustion are due to ignorance and might, with a very small amount of knowledge correctly applied, be easily obviated.

We can cordially commend this book.

MARSHALL D. EWELL, M. D.

The Kent Law School of Chicago.

A TREATISE ON THE LAW OF LIENS, COMMON LAW, STATUTORY, EQUITABLE AND MARITIME. By LEONARD A. JONES. Second Edition. Revised and Enlarged. In Two Volumes. Boston and New York: Houghton, Mifflin & Company. The Riverside Press, Cambridge. 1894.

Prior to the first edition of this work it is a question whether any other branch of the law could lay claim to an equal lack of clear comprehension. A "lien" has always represented to the mind of the average man (and to only too many lawyers), the idea of a charge upon property, of any and all kinds and descriptions, even as to the newspaper omniscient "defalcation" is a dignified species of embezzlement. Accordingly, side by side with the liens of attorneys, etc., we hear men speak of the lien of a mortgage an assignment, a judgment, etc., etc. Even in that great fountain of law, the Acts of Assembly, such confusion of terms is the invariable rule. It would be difficult to find a statute that speaks of the "encum-

brance" of a mortgage, or of a judgment. And yet, as Mr. Jones clearly shows, this general, popular nomenclature is, as it is very apt to be, wholly in the wrong. The so-called "liens" of this kind find, therefore, no place in this work; and the unsuspecting lawyer who turns to it for information on those subjects will be disappointed, even though his mental horizon may be enlightened in another direction.

What, then, is a "lien," within the scope of this work? It must be confessed that, though the several species of liens are defined with great clearness, the broad line of distinction between a "lien" in general and a charge on property is left in a hazy state. But probably this was inevitable. It is hard to find a definition which will include common law, statutory and equitable, to say nothing of maritime liens. "A lien at law," says the author, "is an implied obligation whereby property is bound for the discharge of some debt or engagement. It is not the result of an express contract; it is given by implication of law." Now it is clear that this definition cannot be applied to a statutory lien, which is given by the express words of a statute, unless we regard the statute as implied in the agreement between the parties. So, too, an equitable lien, which arises from express words in a contract, cannot be classed under this definition. An example will make this clearer. At common law an innkeeper has a lien on the goods of his guest until his charges are paid. The guest may contract with him that he shall retain a special part of his baggage. This discharges the lien on the rest, and creates an equitable lien on the part so retained. Again, a lien on the property of a guest may be declared by statute, which will supersede the common-law lien. In each case the result is the same, but the three liens are totally different in their origin.

The most general definition of a lien that Mr. Jones gives is, that it is a right of detainer. This, however, only applies to personal property, and not to a mechanic's, or other lien on real estate. A lien on personal property can in general only attach to property in the possession of the lien-holder, and which he can detain; but the mechanic is not in possession of the real estate to which his claim attaches.

Without going into the subject farther it may suffice to say that the most satisfactory definition of a "lien" in the strict sense is, that it is a fixed charge upon specific property, not coupled with an interest. This Mr. Jones clearly implies, though he does not state it in so many words.

There is very little that has escaped the author's research; and he has fortunately not felt himself tied down to a bare statement of the express decisions on any subject, but has gone in most cases into a more or less detailed discussion of collateral points, tending to elucidate questions not yet decided, but which may arise. The chapter on the Lien of a Finder of Lost Goods is a clear illustration of this. After stating that at common law the finder has no lien, he does not merely add that if a reward has been offered the finder has a lien for the reward; but goes on to discuss the incidents of the offer, when it becomes a contract, what constitutes a performance of its terms, when the offer may be withdrawn, etc., until he has covered almost every conceivable question that can be raised.

And yet, there are some matters which Mr. Jones has either failed to notice, or considered as beneath his notice. It is rather depressing to local pride to find no mention of *Cadwalader v. Dilworth*, 26 W. N. C., 32, the sole case in which a court has decided that an *agristor* has a lien at common law upon a horse which he has taken to board. However, opposed as that case is to an overwhelming array of authorities, its citation would have served no good purpose, except as showing the presumable opinion on that subject in Pennsylvania.

There are some slight inaccuracies and deficiencies of statement to be found here and there. In discussing lumbermen's liens the author states (§ 722), that "the contractor is not in general an agent of the owner to employ men and bind the owner or his property." But he omits to state that this rule depends wholly on the nature and terms of the contract (in other words, whether or not the contractor is to be regarded as independent). If he is not independent, but under the control of the owner, authority to employ men on behalf of the latter will, in the absence of express restrictions, be

inferred from the contract. It is clear, therefore, that no general rule can be predicated where it depends on the circumstances of the particular case.

So, he states in § 1033 that the lien-holder who sells the property subject to the lien may set up the lien as a defence to any action which the owner may bring against him for a conversion. But this, as shown by §§ 523 and 525, is only partially true. In any case the lien could only serve as a defence *pro tanto*; that is, as a set-off. And he does not state the fact, decided in one of the very cases he cites, that the purchaser of the property may set up the lien as a defence to an action of replevin brought by the owner, he being in this regard substituted to the rights of the lien-holder.

Again, in discussing the vendor's lien upon real estate for unpaid purchase money, while rightly omitting Pennsylvania from the list of States in which that lien is recognized, the author also omits to state that it was nevertheless decided in *Stokely v. Trout*, 3 Watts, 163, that whenever the agreement between the vendor and vendee contemplates another deed, though in the words of a present conveyance, the vendor has a lien for the unpaid purchase money.

And again, in treating of the effect which an agreement by the principal contractor not to file a mechanic's lien has upon the right of a sub-contractor, though correctly stating the law to be that a covenant to that effect by the contractor will bind the sub-contractor, he overlooks the decision in *Evans v. Grogan*, 153 Pa., 121, that to have that effect, it must be a covenant in the strict sense, not a mere promise that liens shall not be filed.

All these errors, however, are but of minor importance compared with the value of the work as a whole, and are such only as are inevitable in any human performance. No other work on the subject can compare with this in logical arrangement, clear style, or accurate statement. The chapters on Mechanics' Liens, which form over two-thirds of the text of the second volume, contain a presentment of the law on that vexed subject that is without a rival. After their perusal, one can say with confidence that he knows something about the

subject, a statement which would have been rash, indeed, before Mr. Jones gave us the fruit of his labors. The same might be said of other portions of the work:

A very valuable feature is the abundant presentment of statute law, a feature which was really rendered essential by the nature of the subjects treated; but it is matter for regret that the references are too often made to compilations only, and not to the annual volumes of laws. An index of statutory law, though involving much additional labor, would have been an important adjunct to the work.

The index, too, might have been fuller. As it is, it savors too much of the logical arrangement of the work, and not enough of the alphabetical nature of an index proper. You will find the titles "contractor" and "sub-contractor" safe and sound under the shelter of "Mechanics' Liens," but will look for them in vain in their alphabetical place. So with many other subjects.

It is also disappointing to find the subject of municipal liens dismissed with a cursory reference to the liens of taxes and water rents. These are certainly matters of great importance, and fall as legitimately within the scope of the work as do Mechanics' Liens. It may be, however, that the author felt himself restrained within the bounds of the property relations between private individuals, in which case the liens of the public would not strictly belong to the subject in hand. Yet, treated as Mechanics' Liens have been, it would have greatly enhanced the value of the work; and we may be permitted to express the hope that in the future the author may turn his hand to this subject also.

R. D. S.

FORMS IN CONVEYANCING AND GENERAL LEGAL FORMS, Comprising Precedents for Ordinary Use, and Clauses Adapted to Special and Unusual Cases. With Practical Notes, by LEONARD A. JONES. Fourth Edition. Boston and New York. Houghton, Mifflin & Co., 1894.

The first edition of Mr. JONES's work made its appearance about seven years ago. Only last year we expressed our

admiration for the book on the publication of the third edition. That the fourth is already before us is sufficient evidence of its success.

A book of legal forms is perhaps not *essential* to the library of an old practitioner, but to any law library it is a convenient addition, and to a young and inexperienced member of the profession an invaluable aid, for it saves him much time and may save him many mistakes. Of course, it is upon its being practical and absolutely accurate that the value of any book of forms depend. It must contain models of all documents included in its subject that a lawyer finds himself called upon to draft. The field of conveyancing is a broad one, extending, as it does, from the simplest deed or argument to the most involved will or complicated mortgage.

Mr. JONES's work fulfils its mission. It gives us the forms of conveyance of every kind which the various states prescribe, or their courts sanction. These are well suited to the practitioner's needs. The precedents are skilfully and carefully prepared.

The general arrangement is admirable. Foot notes call attention to variations in the different states from the forms given, with references to the state laws. W. S. E.

We owe an apology to the publishers of the General Digest of the United States, the Lawyers Co-Operative Publishing Company, Limited, for a misstatement of fact in our review of that work, which appeared in the February number of the AMERICAN LAW REGISTER AND REVIEW. We stated that the cases which were printed in small type, which were apparently notes to the other reported cases, were not, as notes, very useful. We mistook the character of these small cases, which were printed in small type. They are bye-report cases. Our criticism, therefore, to these cases as notes was a criticism on an entire misconception of the nature of the cases. Undoubtedly bye-reports are useful in a Digest. It is also a good idea to print them in small type, so that one can immediately discern whether the principle annunciated is one which has the authority of a court of the last resort.

COMMUNICATIONS.

After this second article in reference to the natural use of lands, which was published in the February number had gone to press, Mr. McMurtrie called the writer's attention to the recent decision of the House of Lords in *Young v. Bankier Distillery Company*, 1893 Ap. Case, 691. In this case, published since the article was written, the lessors of a colliery pumped mine water from their workings into a stream, stated to be the only natural outlet for carrying the water off, upon which the inferior land owner had for many years maintained a distillery. The action was brought (in Scotland) to have the mine owner indicted from discharging his water into the stream and for damages. A judgment in favor of the plaintiffs was affirmed by the House of Lords and Sanderson's case cited by the appellants was strongly disapproved.

Lord MacNaghten, said:

"Then the appellants urged that working coal was the natural and proper use of the mineral property. They said they could not continue to work unless they were permitted to discharge the water which accumulates in their mine, and they added that this water course is the natural and proper channel to carry off the surplus water of the district. All that may be very true, but in this country at any rate it is not permissible in such a case for a man to use his own property so as to injure the property of his neighbor."

And Lord Shand, said:

"The defenders' counsel incited your Lordships to follow the decision in an American case decided in Supreme Court of Pennsylvania—the case of *Pennsylvania Coal Company v. Sanderson*, 56 American Rep. 89, decided in February 1886. In that case, undoubtedly, the court held that the owners of a mine were entitled to pump up water from the low strata of the mine and to send it into an adjoining stream, although the quantity of the water was thereby increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. The case had been twice previously

before the court and on both occasions the judgment was given against the mine owner. On the third occasion, which occurred in consequence of a third trial to assess the damages the jury found a very large sum due to the lower owner; but the verdict was quashed and the whole case reconsidered in the reference to the legal rights of the parties with the result I have stated. In a court of seven judges there were three who dissented from the judgment, including the Chief Justice of the State. This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight. . . . I shall only add that while the enormous value of the mining interests in the district of Pennsylvania, from which the case came, and which is fully explained in the judgment, might have found a good reason for appealing to the legislature to pass a special measure to restrain any proceeding by interdict, at the instance of surface proprietors, and to confine them to a right to damages only for injury sustained, that value could not in my opinion afford no good legal ground for allowing the proprietor of a mine so to work his minerals for his own profit as to destroy or greatly injure his neighbor's estate, by subjecting it by means of artificial operations to the burden of receiving water, enlarged in quantity and destroyed in quality, without payment of compensation or damages for the injury done. . The case has no application to the present because the decision was based on special circumstance as to the great relative value of the minerals as compared with the surface in the district; and because in any view the decision seems to me to have been making law rather than interpreting the law, so as to give effect to sound, just and well recognized principles as to the common interest and rights of upper and lower proprietors in the running water of a stream."

ABOLISH THE SEAL

Is it not about time that the Legislature helped the courts to get clear of, avoid and abrogate that relic of legal barbarism, *the seal*? Since the time when it required the impression of

the sealer's thumb upon wax, until now, when the dash of a pen, intended as a seal, will do, a long and weary struggle for emancipation has been borne. What does it now import, even in conservative Pennsylvania? *Nothing*, when it stands in the way of the supposed justice and merits of a transaction. The sessions and the statutes have so belabored the ancient solemnity and sacredness of *the seal*, that about the only quality left unattacked, is preventing the bar of a statute of limitations. And even that is of doubtful advantage. If a man has a note about to be barred, the courts are open let them implead one another. So long as it is not required that it be stated in the body of the instrument that it is *sealed*, a scroll or a dash by the holder will do the business. Get your judgment, if you have an honest claim, it will defy the statute. By the old statute a Writ of Error could be taken within seven years; since 1874, within two years. By the old law, in partition, the sheriff took twelve men; since 1879, six men. By the old law the lien of decedent's debts remained for five years; now by Act of 1893, two years.

Are not these improvements? Do they not expedite business and legal affairs? Emancipate all instruments *for the payment of money* from the legal requirement of a seal. Leave it, if you please, on Wills, and on Deeds, as a relic. *Tempus fugit*. Let us get on.

J. G. F.

BLOOMSBURG, PENNA.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

APRIL, 1894.

IS THE PRESIDENT OF THE UNITED STATES
VESTED WITH AUTHORITY UNDER THE CON-
STITUTION TO APPOINT A SPECIAL DIPLO-
MATIC AGENT WITH PARAMOUNT POWER
WITHOUT THE ADVICE AND CONSENT OF
THE SENATE?¹

By FRANCIS N. THORPE, Ph. D.

The executive power of the United States is vested in the President who "shall nominate and by and with the advice and consent of the Senate appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution of the United States. Congress at its discretion may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. (Const. U. S., Art. II, § 2, 2.)

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties. . . . His duties are continuing and permanent, not occasional or temporary. They are such as his superior in office should prescribe:" U. S. v. Hartwell, 6 Wall. 393.

¹This article is a reply to one by Henry Flanders, Esq., in the March number of the AMERICAN LAW REGISTER AND REVIEW, p. 177.

"The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed not only in making appointments but in all that is incident thereto:" *U. S. v. Perkins*, 116 U. S. 485. In *U. S. v. Germaine*, 99 U. S. 511, Justice MILLER said: "In the case before us the duties are not continuing and permanent and they are occasional and intermittent," whence it followed that the person was not an officer and his employment was not an office in contemplation of law. Chief Justice MARSHALL in *Little et al. v. Barrieme et al.*, 2 Cranch, 170, decided in the February term, 1804, said: "The instructions cannot change the nature of the transaction, or legalize an act, which, without those instructions, would have been a plain trespass;" the case involving the actions of a commander of a ship of war of the United States obeying his instructions from the President of the United States. The commander acts at his own peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured by the execution.

Diplomatic officers shall be deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, charges d'affaires, agents, and secretaries of legation, and none others. (Revised Statutes, 1674.)

To entitle any charge d'affairs, or secretary of legation or embassy to any foreign country, or secretary of any minister plenipotentiary, to compensation, they shall respectively be appointed by the President, by and with the advice and consent of the Senate. (Revised Statutes, 1684.)

No diplomatic or consular officer shall correspond in regard to the public affairs of any foreign government with any private person, newspaper, or other periodical, or otherwise than with the proper officers of the United States. (Revised Statutes, 1751.)

From these data it is possible to determine exactly what is signified under the Constitution and laws of the United States by the term "officer" and "diplomatic officer."

On the seventh of March, 1894, President Cleveland sent

Hon. James H. Blount, of Georgia, to the Sandwich Islands, and four days later the Department of State issued to Mr. Blount his instructions and commission of which the following is part:

"The comprehensive, delicate, and confidential character of your mission can now only be briefly outlined, the details of its execution being necessarily left, in great measure, to your good judgment and wise discretion.

"You will investigate and fully report to the President all the facts you can learn respecting the condition of affairs in the Hawaiian Islands, the causes of the revolution, by which the Queen's Government was overthrown, the sentiment of the people toward existing authority, and, in general, all that can fully enlighten the President touching the subjects of your mission.

"To enable you to fulfill this charge your authority in all matters touching the relations of this Government to the existing or other Government of the Islands, and the protection of our citizens therein, is paramount, and in you alone, acting in co-operation with the commander of the naval forces, is vested full discretion and power to determine when such forces should be landed or withdrawn.

"You are, however, authorized to avail yourself of such aid and information as you may desire from the present minister of the United States at Honolulu, Mr. John L. Stevens, who will continue until further notice to perform the usual functions attaching to his office, not inconsistent with the powers intrusted to you. An instruction will be sent to Mr. Stevens directing him to facilitate your presentation to the head of the Government upon your arrival, and to render you all needed assistance, etc., etc."

Mr. Blount was not appointed by and with the advice and consent of the Senate. President Cleveland appointed him with authority paramount. Was the President authorized, under the Constitution and the laws of the United States, to make such an appointment?

The term paramount is defined in the *Century Dictionary*: "Supreme; superior in power or jurisdiction; chief; as lord

paramount, the supreme lord of a fee, or of lands, tenements, and hereditaments; the highest in rank or importance." Mr. Blount's authority, according to his instructions and commission, out-ranked that of the United States minister at Honolulu, Mr. Stevens, who had been appointed by and with the advice and consent of the Senate.

Has the President authority to send an agent whose authority shall be paramount to that of an ambassador, minister, consul, or charge d'affaires, unless that agent is appointed by and with the advice and consent of the Senate?

The discussion on the adoption of the article which vests the appointing power in the President, by and with the advice and consent of the Senate, began July 21, 1787, and the motion that the judges should be nominated by the Executive and such nominations become appointments unless disagreed to by two-thirds of the second branch of the Legislature, made by Madison three days before, was resumed. "Mr. Madison stated, as his reasons for the motion, first, that it secured the responsibility of the Executive, who would, in general, be more capable and likely to select fit characters than the Legislature, or even the second branch of it, who might hide their selfish motives under the number concerned in the appointment; secondly, that, in case of any flagrant partiality or error in the nomination, it might be fairly presumed that two-thirds of the second branch would join in putting a negative on it. . . . The Executive Magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the United States." On the seventh of September, in the debate on the clause, "He shall nominate, etc., appoint ambassadors, etc.," Mr. Wilson objected to the mode of appointing, as blending a branch of the Legislature with the Executive. Good laws are of no effect without a good executive; and there can be no good executive without a responsible appointment of officers to execute. Responsibility is, in a manner, destroyed by such an agency of the Senate. He would prefer the council proposed by Col. Mason, provided its advice should not be made obligatory on the President.

"Mr. Pinckney was against joining the Senate in these appoint-

ments, except in the instances of ambassadors, who, he thought, ought not to be appointed by the President.

"Mr. Gouverneur Morris said that, as the President was to nominate, there would be responsibility; and as the Senate was to concur, there would be security."

The idea advanced by Morris is undoubtedly the fundamental one in the matter of executive appointments by and with the advice and consent of the Senate. The President is empowered to appoint secret agents, and a contingent fund amounting annually to about \$500,000 is placed at his disposal, to enable him to acquire such information as, in his judgment, may seem necessary. The reason for placing such a fund at his disposal likewise places a contingent fund at the disposal of the Senate and of the House of Representatives. As Commander-in-chief of the armies and navies of the United States, the President is empowered to send special agents to any part of the world to make investigation for the President touching matters pending, or likely to be pending, between the United States and another country or people. The nature of the inquiry to be made by such a special agent is described by Webster in his Huselmann note, in which he says of Mr. Mann's errand:

"Mr. Mann's errand was, in the first instance, purely one of inquiry. He had no power to act unless he had first come to the conviction that a firm and stable Hungarian government existed. 'The principal object the President had in view,' according to his instructions, 'is to obtain minute and reliable information in regard to Hungary in connection with the affairs of adjoining countries, the probable issue of the present revolutionary movements, and the chances we may have of forming commercial arrangements with that power favorable to the United States.' Again, in the same paper, it is said: 'The object of the President is to obtain information in regard to Hungary, and her resources and prospects, with a view to an early recognition of her independence and the formation of commercial relations with her.'" (Wharton, *Int. Law*, Chap. III, 47.)

President Monroe, in 1816, sent Rodney, Bland and Graham

as commissioners to inquire into the condition of several South American colonies. These commissioners were not nominated to the Senate, although that body was in session at the time of their appointment. When the diplomatic appropriation bill came up in the House, Clay excepted the insertion of \$30,000 for the payment of these special commissioners, insisting that being diplomatic agents, their nomination should have been sent to the Senate and by the Senate confirmed. The payment was not met out of the contingent fund, but a special appropriation was made under the head of incidental expenses. (Ib.)

These and other precedents have been cited by advocates of the authority of the President to appoint Mr. Blount with paramount power. Upon examination, they cease to be precedents for Mr. Blount's appointment. To the extent that they are precedents for the appointment by the President of an agent to make inquiry, they are precedents for Mr. Blount's appointment; there is no precedent for the appointment of Mr. Blount with paramount power without the advice and consent of the Senate. In every case of the appointment of a special commissioner, or agent, by the President to enter into treaty negotiations, the treaty thus negotiated was merely suggestive and in the nature of information, until it was submitted by the President and ratified by the Senate. No Presidential agent can make a treaty; no Presidential messenger can be constitutionally empowered with paramount authority without the advice and consent of the Senate. Neither the Constitution nor the laws nor the force of custom gives authority to the President for such an appointment as that of Mr. Blount. If the President may appoint a diplomatic agent with paramount power, the office of the Senate in the appointing power is superfluous. What shall restrain a President from appointing such a paramount agent to England, to Germany, or to France, where he shall be superior to the American Ambassador appointed by and with the advice and consent of the Senate? What Ambassador, Minister, Consul, Charge d'Affaires, what Superintendent of the Mint, Collector of the Port, United States Marshal, Federal Judge may not find himself under the authority of a

paramount appointee of the President? Such an appointee may plunge the country into war, may strain commercial relations, may interfere with pending treaties, may ignore, or even defy, the legislation of Congress.

The theory that the President possesses such power of appointment is not supported by any accepted interpretation of the principles on which representative government in this country is founded. The powers delegated to the United States are distributed into three groups, known as the executive, the legislative, and the judicial. Neither of these is independent of the other. In the appointing power, and in the treaty-making power, the President and the Senate must co-operate. Congress alone has the power to declare war. These delicate relations would be dangerously confused were the President suffered to make paramount appointments without the advice and consent of the Senate. Such appointments at once transform the government of the United States into a discretionary monarchy. As Morris said of the office of the Senate in the appointing power, it is for "security."

By the definition of the term "officer" laid down by the Supreme Court, Mr. Blount was not an officer; as he was not nominated to the Senate, nor confirmed by them, he was not an ambassador, public minister, or consul. As an agent sent on a mission of special inquiry by the President he was subject to the protection of the Constitution and the laws of the United States. He possessed no more authority than any secret agent of the government.

The insertion of the word "paramount" in his commission, and his subsequent action in obedience of the intimations implied by that word; his assumption of authority over the American minister at Honolulu; his ordering down the American flag; his direction of affairs as the actual American minister, were assumptions wholly without precedent in custom, or in law, and without warrant under the Constitution. He was but a ministerial agent and could possess no paramount authority unless that authority was given him by appointment from the President by and with the advice and consent of the Senate. He was not an officer in contempla-

tion of law; his duties were occasional and temporary, prescribed by his superior, the President of the United States. As was said by Chief Justice MARSHALL in *Little et al. v. Barrieme et al.*, the instructions to Mr. Blount cannot change the nature of the transaction or legalize any act which, without those instructions, would have been a plain trespass. Mr. Blount acted at his peril. As well might Strafford have pleaded the King's writ as Mr. Blount might plead the President's commission. Neither Charles Stuart nor Grover Cleveland can be above the law.

From the language of the Constitution of the United States, from the language of the Acts of Congress, from the language of the Supreme Court, from precedents, from the nature of American institutions, it can only be concluded that the President of the United States has no power to appoint a paramount diplomatic agent except by and with the advice and consent of the Senate.

THE TESTIMONY TAKEN BEFORE A CORONER CONSIDERED AS EVIDENCE.

By WM. A. McNEILL, Esq.

The decision of the coroner, excluding Col. Ainsworth and his counsel from the deliberations of the jury, impanelled to inquire into the causes of the late disaster at Ford's Theatre, has been the occasion of comment and discussion, not only within legal circles, but also among those who have viewed the situation from the standpoint of a layman. With all due deference to the magistrate who has made this ruling, we beg leave to enter our respectful protest against his decision, and in so doing, may unintentionally, though not unwillingly, accede a greater importance to the coroner's office than the Washington official has ever claimed. Upon a thorough investigation of the subject of the coroner's office, we have concluded:

1st. That a coroner holding an inquisition *super visum corporis* is a court of record.

2d. His inquest is in the nature of a proceeding *in rem*, and is *prima facie* evidence of all facts found therein, and in a civil case throws the burden of proof on the party alleging the contrary.

3d. All depositions or testimony taken before the coroner's inquisition, whether reduced to writing or not—is evidence for or against any one who may be thereby affected.

I. THE CORONER'S COURT IS A COURT OF RECORD.

We are impressed with the importance of this office whenever it is mentioned by the old common law writers. Coke (Institutes 81) calls him the *vita reipublice pax*. The same authority (2 Institutes and 4 Institutes) informs us that: "He was so called because he hath to do principally with the pleas of the crown, or such wherein the king is more immediately concerned." "In this light the Lord Chief Justice of the King's Bench is the principal coroner of the kingdom."

"He (the coroner) must have a sufficient landed estate to uphold the dignity of the position:" The "Mirror" Chap. 1, Sec. 2. Under the old common law he (the coroner) could hold pleas of the crown:" The "Mirror" Chap. 1, Sec. 3.

The right to hold pleas of the crown was taken from the coroner by the *Magna Charta*, but was restored by the statute *de officio coronatoris* IV, Edward I. Among other things the statute directs: "If any man be slain, and the culpable man be found, he shall be amerced, all his goods and corn within his grange, and if a freeman, his land shall be valued and this escheat to the crown. Coroners shall take the testimony of the witnesses in writing. If any coroner may find any nuisance by which the death of a man happened, that the township shall be amerced on such finding." Statute III, Henry VII directs: "That after the felony found the coroner shall deliver therein inquisitions afore the justices of the next gaol delivery in the shire where the inquisition is taken, . . . and if any coroner do not in such manner certify his inquisition, he shall be fined one hundred shillings."

Statute II and III, Phillip and Mary, Secs. 4 and 5: "Every coroner upon inquisition before him found where any person or persons shall be indicted for murder or manslaughter committed, shall put in writing the effect of the evidence given by the jury before him, being material," etc., "and return the same to the Justices of Eyre."

Coke tells us that the substance of all the foregoing statutes is to be found in the "Mirror," which was written before the Conquest of England by the Normans, but was edited and enlarged by a most discreet man by the name of Horne in the reign of Edward I: Preface to Coke's Reports, 9th and 10th Vol.

Viner's "Abridgment of the Common Law," informs us that the substance of all these statutes are to be found in the common law writers, and was the common law in the time of Glanville, Fleta Britton and Bracton. Hawkins Pleas of the Crown, and Bacon's Abridgment state that the statute *de officio coronatis* is wholly directory and in affirmation of the common law, that the coroner is not excused from any of his duties, under the common law, which were incident to his office before the enactment of that statute: 2 Hawkins, 1st C., Chap. 9, Sec. 28; Bacon's Abridgment-Coroner.

"The offices of the coroner," says Hale, "are judicial and ministerial; and his office did not determine with the death of the king. He could hold no inquest save in death. Under the common law, he should take down the evidence of the witnesses in writing, and return the same and the finding of the jury to the Court of Eyre or Nisi Prius:" Hale's Pleas of the Crown.

The Secretary of Edward VI and Elizabeth, Sir Thomas Smith, in his history of the commonwealth tell us that: "The impannelling of this inquest (the coroner's) and the view of the body is commonly in the streets, in an open place and in *coroni populi*."

His duties are described by COKE: "A coroner may and ought to inquire of all the circumstances of the party's death, and also of all things which occasioned it; and, therefore, it is said, if it be found by his inquest that the person deceased, was

killed by a fall from a bridge into a river, and that the bridge was out of repair by the default of the inhabitants of such town, and those inhabitants are bound to repair it, the township shall be amerced:" Coke's *Lyttleton*, 277-83.

It was also his duty to admit the evidence on both sides. Thus, we read: "The coroner must admit the evidence on both sides of the question, and if not admitted the inquest will be quashed:" 1 *Leving* 180. "Coroners ought to hear evidence and counsel on both sides:" 2 *Siderfin Reports* 90-91. "In the court of King's Bench a rule was granted for a coroner to show cause why a criminal information should not be filed against him for refusing on taking an inquisition *super visum corporis* to receive evidence on the part of the party accused:" 1 *Leach Crown Cases* 43. "An inquest of office by the coroner or escheator is public and every one has a right to be heard; and it is conclusive against the world:" *Starkie on Evidence*.

"Inquest of office is of such notoriety that the law presumes every one to be present; it is an inquest of office and is open to every one and is against the world.

Statutes 34, Edward III, C. 13, 36 Edward III, C. 13, 1 Henry VIII, C. 8, 2 and 3, Edward VI, C. 8, 3 *Term Reports*, 707-12-21. See also Lord Kenyon's Opinion. *Phillip on Evidence* citing: 3 *Kible*, 489; 6 *Best and Cress*, 611-27; 2 *Burrows*, 43; 1 *Saunders*, 362; 9 *Dowling and Ryland*, 247. Also *Boisliniere v. County Commissioners*, 32 Mo. 375.

"Again, the coroner's inquest is a court of record of which the coroner is judge:" 6 *Best and Cress*, 611-25.

II. THE CORONER'S INQUEST IS AN ACTION IN REM.

We will now consider whether a coroner's inquest is an action *in personam* or an action *in rem*. A coroner's inquest *super visum corporis* is a proceeding on behalf of the people to determine how and by what means the person before whom the coroner's jury was impanelled, came to his death. If then, a judgment *in rem* (12 A. and E. Ency. p. 62), is: "A judgment against some person or thing upon the status of the person or the nature and condition of the thing, and is equally

binding on all persons," will not an inquest by a coroner come within this definition? The more technical definition of a coroner's inquisitions, to wit: "A proceeding instituted on behalf of the public for or against no one in particular, but against or upon the thing or subject, whose state or condition is to be determined," agrees with the definition of an action *in rem* as defined by the Supreme Court of Vermont (20 Vermont Reports, 65), where the distinction between actions *in personam* and *in rem* is fully discussed. "A judgment *in rem* I understand to be an adjudication pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is, in form as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record, and those claiming by them. A judgment *in rem* is founded on a proceeding instituted not against the person as such, but against or upon the subject matter itself, whose state or condition is to be determined. It is to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and *ipso facto* renders what it declares it to be, etc., no process issues against any one, but all persons interested in determining the state or condition of the instrument are constructively notified:" 20 Vermont Reports, 65.

"Such inquests are of a public nature, and taken under competent authority, to ascertain a matter of public interest, are upon principles already announced admissible in evidence against the world. They are analogous to adjudications *in rem*, being made on behalf of the public; no one is properly a stranger to them; and all who can be affected by them have the power of contesting them:" 1 Starkie on Ev., 307-8, 7 Am. Ed.

That a coroner's inquest is in the nature of a proceeding *in rem* is admitted by Starkie: 2 Starkie on Ev., 384-5, 7 Am. Ed.

Saunders' Pleadings and Practice, page 219, admits that a coroner's inquest is in the nature of a proceeding *in rem*.

In *Rex v. Killinghall*, Chief Justice MANSFIELD informs us that "an inquest of the coroner is likened to *other* inquests of office:" 1 Burrows' Reports, 17.

The author of the celebrated Commentaries, Sir Wm. Blackstone, held, in the case of *Scott v. Shearman*, that "the reason given in some books why this inquest (*fugam ficti*) is not traversable like *other* inquests of office, is because of the notoriety of the coroner's inquest *super visum corporis*, at which the inhabitants of all the neighboring villages are bound to be present:" 2 Wm. Blackstone, Rep. 981.

All the writers on evidence admit that an inquest of a coroner *super visum corporis* "is, in the language of MANSFIELD, likened to *other* inquests of office," and it is admitted that an inquest of office is a proceeding *in rem*. Such being the case the Supreme Court of Tennessee has by analogy decided that the testimony taken before a coroner's jury is evidence at a subsequent trial, that the finding of such jury is evidence of all facts found therein. The case of *Pinson and Hawkins v. Ivey*, involved the point whether the testimony taken before commissioners under the Act of 1819 is receivable as evidence in a subsequent trial. The court held that: "Proceedings *in rem* operating upon the property claimed without notice to adverse claimants, are had in prize courts in all civilized countries; the same course is pursued in the English Court of Exchequer in cases of forfeitures for treasons, felonies, or a violation of the revenue laws. Proceedings are had in the nature of proceedings *in rem*, and without notice, in courts admitting wills to probate and granting administration, and the expectancies of heirs and distributees, swept away when the weakness of infancy, or residence in a foreign land should, seemingly, protect them, because of the permanent political consideration, that the rights of property thus situated should be speedily settled by legal ascertainment of them. All of which adjudications are dictated by public policy and necessity, regardless to some extent, of private rights."

"For similar reasons this course is pursued in the collection of revenue, where the daily practice is to render up judgment and dispose of property for taxes without notice to the owner.

Where a proceeding has been had and an adjudication made, in any of the courts above referred to, although *in rem* or in the nature of a proceeding *in rem* and without notice; still, whenever the judgment is drawn in question in another action affecting the same property or subject matter, the only inquiry that can be made in the second action is, had the court, rendering the first judgment, jurisdiction over the subject matter and did it decide the same? If the first tribunal had jurisdiction and has passed judgment, then such sentence or decree is conclusive and final upon all interested; and *stops* all other courts or tribunals before which is attempted to be litigated the same matter. The facts found by the first tribunal, which were necessary to the formation of the sentence pronounced, are also conclusive of the existence of such facts and can never be the subject of inquiry upon a subsequent investigation in another tribunal, more than the sentence itself."

The same decision says that proceedings before justices of the peace in certain cases and condemnation of commissioners of excise, and that commission instituted by North Carolina to issue military land warrants, and various other tribunals, spiritual and otherwise, are conclusive, because they are proceedings in the nature of a proceeding *in rem*: Pinson and Hawkins v. Ivey, 1 Yerger, 349-50.

No one will question that the coroner has exclusive jurisdiction to hold an inquest over the remains—that his inquest is to find out how the person was killed, and by whom—his inquest is held on behalf of the public, and for or against no one.

III. ALL DEPOSITIONS OR TESTIMONY TAKEN BEFORE A CORONER'S INQUISITION, WHETHER REDUCED TO WRITING OR NOT, ARE GOOD EVIDENCE FOR OR AGAINST ANYONE, WHO MAY BE THEREBY AFFECTED.

Upon these grounds the courts have admitted the testimony taken before a coroner's jury, whether reduced to writing or not, as good evidence in any cause of action, and have held that the finding of the jury on a coroner's inquisition throws the burden of proof in a civil case on the party alleging the

contrary. Such depositions, as taken before the coroner's jury, are in the language of the Chief Justice of England, Sir Thomas Jones, "good evidence of murder or anything else." This rule of law is as old as the common law. It does not depend upon statutory enactments for its origin. Testimony taken before a jury impanelled by the coroner has been received as evidence. "Whether the party to be effected was present or not, or had never heard of the proceeding until such testimony is produced in court," by every Chief Justice of England from the time of Edward III. down to and including the reign of Victoria. To show how well settled this rule of law is, we will not confine ourselves to one or more decisions from the courts of England, but will cite decisions and *dicta* from each and every one of the decisions of the Chief Justices and Chancellors of England from the time of Lord HALLE down to and including the present Chief Justice. We will also cite decisions and *dicta* from the courts of this country, from New York, Vermont, Georgia, Arkansas, Alabama, Louisiana and from North Carolina. Such evidence is receivable in every one of the United States, unless this law has been repealed. Of course, in most of the States in criminal cases it has been repealed so far that the *prisoner* "must be met face to face by his accusers."

The first decision we cite on the subject of the coroner's inquisition was rendered in the reign of Edward III. This was the Barclai case, in which the court held: "A creditor of one Page, who was found *felo de se* by the coroner's inquisition, traversed the finding, and the jury found that he was not a *felo de se*: Barclai Case, East 45.

"If a man be drowned in a pit, the pit cannot be forfeited, the coroner may charge the township to stop the pit, and make entry thereof in his rolls; and, if it be not done before the next gaol delivery, the township shall be amerced:" 8 E. Carone, 416.

Inquests and the testimony of witnesses before a coroner's jury were used as evidence in Keilway's Report, page 97 and Aley's Report, 51. These early decisions are quoted to show that all the writers on evidence had not examined this

rule of law when they stated that the reception of depositions and testimony taken before a coroner's inquest was under the Statutes of 1 and 2, 2 and 3 Phillip and Mary. The instances are innumerable where such testimony was received in the reigns of Elizabeth, James I., Charles I. and Cromwell. One has only to have a "smattering" knowledge of English history to discover that such evidence was more frequently used than the testimony of witnesses, who met the accused face to face. The first case we will cite after the restoration is the case of Lord Morley before the House of Peers. History states that Lord Morley *was not present*, when the coroner held his inquest over the body of the victim. The House of Lords, upon finding certain facts, summoned "the Judges of all England, consisting of the Chief Justice, Sir John Keylinge, Justices Bridgeman, Atkin, Twisden, Tyrell, Turner, Browne, Wyndham, Archer, Raynsford, Morton and Sir Matthew Hale, to attend a trial before the House of Peers. They met and, upon the facts presented, *inter alia*, resolved *una voce* :

"That in the case any of the witnesses who were examined were dead or unable to travel, and oath made thereof, that then the examination of such witnesses so dead or unable to travel might be read, the coroner first making oath that such examinations are the same, which he took upon oath without alteration : " 7 State Trials, 421.

This is a solemn finding of all the judges of England upon facts presented by the highest court of England—the Court of Peers. This finding has been followed in every case where the question arose as to the admission of testimony taken before a coroner holding an inquest *super visum corporis*.

"A deposition taken before a coroner should be used in evidence, if witnesses were dead or beyond the sea, but not if taken before a justice of the peace. For it is said that the authority of a coroner *super visum corporis* is very great, and in some cases cannot be traversed : " Chief Justice, Sir Thomas Jones, Rep. 53.

"A deposition taken before a coroner can be received as evidence : " Chief Justice, Sir John Kelynge, Rep. 55.

During the twelfth and thirteenth year of the reign of Charles II., that king by patent granted all escheats to their former owners. This action was a *scire facias*, by the administration of *Tomes v. Etherington*. Defendant pleaded in bar the finding of the coroner's inquest over *Tomes* (*Tomes* having committed suicide), the court sustained the plea to be a proper plea and held, "An inquest is conclusive against all parties, and is admissible as evidence:" 1 *Saunders's Rep.* 361.

"White, the Coroner of Westminster, offered the examination of witnesses, who were sworn to be dead, and that they were the same taken before him, viz, one Woodward and Hancock, which *per curiam* is good evidence of murder or any other crime:" 2 *Keble*, 19.

"The coroner must admit evidence on both sides of the question, and if not admitted, the inquest will be quashed. Depositions before a coroner are admitted as evidence, the witness being dead:" 1 *Levinz*, 180.

In the case of *Rex et Regina v. Harrison*, Mr. Darnell, the Attorney-General of England, under William and Mary, said: "My Lord, I desire that Andrew Boswell's examination before Mr. John Browne, the Coroner of London, upon oath may be read," which being proved by the coroner, the deposition was directed to be read: 12 *State Trials*, 825.

"Attorney for defendant objected to the reading of an inquisition of lunacy. The inquisition was admitted as *prima facie* proof of such finding:" 2 *Atkyns*, 412.

In *Leighton v. Leighton*, an inquisition *post mortem* was introduced in evidence where the inquest had found one had been seized of a fee in the twenty-fifth year of Henry VIII. The inquisition was admitted, though objected to, and was competent evidence: *Strange's Rep.* 308.

Inquest of a coroner finding the deceased a lunatic, was offered in evidence against the plaintiff, who claimed as executrix under the will of the suicide, for the purpose of showing that the deceased was incompetent to make a will; evidence was objected to on the part of the executrix. Chief Justice Parker was of opinion that the evidence should be admitted: *Strange's Rep.* 68.

"Inquisitions *post mortem* is good evidence of any deed it may find, *in hac verba*." 2 Atkyns, 412.

"Inquisitions *post mortem* are evidence of the facts contained in them, and if the originals are lost, the recitals of them in a proceeding on a petition of right in the *coram rege* will be admitted:" 2 Lord Raymond, 1292.

In the case of *Rex v. Eriswell*, about the settlement of a pauper under 12 and 13 Charles II., evidence was admitted to prove what was said on an examination of the pauper by the two committing justices of the peace, in the absence of the inhabitants or representative of the Parish *Eriswell*. *Held*, under 1 and 2, and 2 and 3, Phillip and Mary, and 12 and 13 Charles II., that this evidence was admissible, even if taken before a justice of the peace, if the case is for the settlement of a pauper. These acts were fully discussed by the four judges. Justice Buller says, "This kind of evidence was very similar to that of a deposition of a coroner, which has been admitted to be good evidence. Though the person accused be not present when it is taken, nor ever heard of it till the moment it is produced against him. The coroner is to inquire into the cause and circumstances of the death of the deceased. Both inquiries are general, and no particular persons are parties to them:" (1 Levinz, 180, Kelynge, 55).

Chief Justice Kenyon in the dissenting opinion said:

"That evidence should be given under sanction of an oath, legally administered in judicial proceeding depending between the parties effecting by it, or those who stand in privity of estate or interest. And as to a judgment being binding, though the party to be effected was not present; I think it will scarcely be found that it is so, unless in cases where the party has had an opportunity of being present or was contumacious, neither of which was the case with the parish now to be effected. The exceptions are founded on the statutes of W. & M. Besides, the examination before a coroner is an inquisition of office; it is a transaction of notoriety to which every person has a right of access:" 3 Term. Rep. 707-12-21.

Starkie refers to the case of *King v. Paine* to uphold his proposition that such testimony, as taken before a coroner's

inquest in the absence of the party accused, is not admissible as evidence.

The counsel made the exception that depositions taken before a mayor could not be used against the prisoner, but admitted that if the testimony had been before a justice of the peace in the prisoner's presence, or before a coroner holding an inquest *super visum corporis*, the evidence offered would be admissible.

In the language of the counsel for defendant this case was not like an information before a coroner or an examination before justices of the peace." The court upheld the view of counsel for defendant: 5 Modern Rep. 163.

An inquisition of lunacy is *prima facie* evidence of lunacy: *Falder v. Silk*, 3 Campbell, 126.

In the case of *Still v. Browne*, it was decided that:

"Depositions of witnesses taken before the coroner on an inquisition touching the death of a person killed by the collision is receivable in evidence in an action for damages, if the witness is beyond the sea:" 9 Carrington & Payne, 245.

In the case of *Prince of Wales Association v. Palmer*, one Palmer had been insured for £13,000 for the benefit of his brother. The insured was an inebriate, and after being insured was murdered by the brother, for whose benefit the policy had been taken out. Before this bill was filed, Palmer, for whose benefit the policy was taken out, murdered some one else, and had been convicted for the second murder and hanged. Bill was filed in the Chancery Court of England by the insurance company to compel the heir to surrender the policy held by him. Inquest was read to prove fraud. The finding of the coroner's inquest was the only evidence produced by the insurance company, a decree was entered compelling the holder to surrender the policy, the court holding: "The finding of a jury on a coroner's inquisition throws the burden of proof, in a civil case, on the party alleging the contrary:" 25 Beavan's Rep. 605.

In *Rex v. Gregory*, the court held that an inquisition before a coroner is receivable to prove the name of the deceased. "The testimony should be reduced in writing, and when

thus taken officially on an inquest, it is, under the circumstances, evidence against the party there or thereafter accused : " 10 Jurist, 387; Phillip on Ev., 10 London Ed. 371.

" There is a class of cases where depositions taken out of court and without the consent of the defendant may be used in evidence against him. " The court goes on to state that the admission is under the statute of Phillip and Mary. That statute does not provide that the testimony shall be admitted, but the depositions are admitted on the ground that they have been taken in the course of a judicial proceeding expressly authorized by law : " *People v. Restell*, 2 Hill (N. Y.), 289-297.

In *State v. Hooker* and *State v. Davis*, the court held :

" What a deceased witness swore to at the preliminary hearing before the committing magistrate is evidence at the trial in chief. Statutes of Phillip and Mary, unless repealed, are in force in this country." The committing magistrate was a coroner. One of the accused was present at the time. Both were convicted : 17 Vermont, 658.

The court, after citing with approval the case of Lord Morley, said :

" The testimony given at a coroner's inquest is admissible as evidence at the trial in chief." The witness who had testified at the inquest of the coroner was in Alabama. The prosecuting attorney had made no effort to obtain witness, and did not swear that the witness could not be obtained or was dead, consequently the testimony when offered was rejected on these grounds alone : *Williams v. State of Georgia*, 19 Ga. 402.

" Coroner's inquests and testimony taken before a coroner's jury are receivable as evidence if properly signed in Louisiana : " *State of Louisiana v. Evans*, 27 La. Ann. Rep. 297.

Testimony taken before a coroner's inquest is evidence in Arkansas (so changed by statute that the testimony must be taken in the presence of the accused) : 2 Ark. Rep. 237-240-49.

Davis v. State of Alabama brought up the question of the interpretation of the statutes of Phillip and Mary, for under these the testimony was admitted. The error assigned in this

case by the counsel for the accused, Davis, was the admission of the testimony taken before the committing magistrate, which testimony had not been reduced to writing as the statute directs. The court, after citing *State v. Hooker*, 17 Vermont, 658; 3 Washington C. C. 244 and 2 Yerger, 58, with approval, said: "These authorities, I think, sufficient to show that the rule is the same in regard to the admission of such testimony, whether it be in a civil or a criminal case. It is true the statute requires that the testimony of the witnesses shall be reduced in writing by the committing magistrate, but it does not, in express words, make such testimony evidence, if the witness should die, but we all know that testimony thus reduced to writing is legitimate proof after the death of the witness. How, I ask, does it become evidence? Not by force of statute, for that does not make it evidence. It must, therefore, become competent proof upon the general rules of evidence; that is, the witness was duly sworn by competent authority and an opportunity of cross-examination afforded. It is these tests that render the testimony of the deceased witness competent proof, and not that it was reduced to writing. If, therefore, the committing magistrate shall fail or neglect to do his duty in reducing the evidence taken before him to writing, this will not take from the testimony of the deceased witness either of the tests requisite for its admissibility as proof. Nor was it the design of the act to *alter the rules of evidence* in reference to such testimony. It was only intended to preserve the evidence, but not to *alter the law in regard to its admissibility*. True, if the magistrate had not omitted to do his duty, and had taken down in writing the testimony of the deceased witness, this examination would have been the best evidence of what the witness swore, but as he failed to do it, this omission does not destroy the evidence of the deceased witness as competent proof, if it can be recollected and accurately stated upon another trial:" *Davis v. State of Ala.*, 357.

In *People v. White*, the court held, "Testimony of witnesses before a coroner's jury may be received as evidence:" 22 Wendell (N. Y.), 17.

"The depositions taken before trustees for relief against

absent debtors, on the same principle as coroner's inquisition, even though *ex parte* is admissible as evidence:" 7 Johnson (N. Y.), 373.

Jackson *ex dem* Potter and Calvin v. Bailey, was an action of ejectment for the recovery of land in the township of Marcellus, in Onondago County. The land was granted to Ephraim Blowers. The lessors of the plaintiff claimed under a deed by Blowers to Van Rensselaers. Defendant contended that Blowers was an infant when the deed was executed. To prove this he called one Matthews, one of the commissioners appointed under the Acts of the Legislature entitled: "An Act to settle disputes concerning title to land in the County of Onondago." To testify what Charles and Jane Blowers, uncle and aunt to Ephraim Blowers, and who were dead, had sworn to before the commissioners at the time the title to the lot was litigated before them by the parties to this cause. The court held that such testimony was admissible as evidence, and said: "But even the want of an opportunity for cross-examination, has not been deemed sufficient to exclude this kind of evidence. For it has been ruled, that if witnesses who were examined on coroner's inquest be dead, or beyond the sea, their deposition may be read; for the coroner is an officer on behalf of the public to make inquiry about the matter within his jurisdiction; and therefore the law will presume the depositions before him to be fairly and impartially taken:" 2 Johnson, (N. Y.) 117-20.

"The testimony of a person examined as a witness before a coroner's jury, such person not being at the time under arrest or charged with crime, may be given in evidence against him on his subsequent trial for the alleged murder of the deceased:" 2 Am. Law Reg. O. S. 1 Parker, 406 or 595.

"The Statutes of 4 Edward I., regulating the power and duties of coroners is in force in Pennsylvania:" 1 W. N. C. 372.

In *State v. Broughton*, the court held their revised Statutes C. 35 on Coroner is taken from the Statutes of Phillip and Mary: 3 Iredell (N. C.), 96, 101.

"In speaking of the duty and authority of the coroner,

Buller affirms: "It is a general rule that depositions taken in a court not of record shall not be allowed in evidence elsewhere; yet if the witnesses on a coroner's inquest be dead, or beyond the sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be fairly and impartially taken, and by the Statutes of Phillip and Mary this power was given to the justices of the peace." Buller's *Nisi Prius*, 242.

"Judgment, decree or verdict, is allowed to operate as evidence against strangers to the original suit, when the proceeding is, as it is technically called *in rem*:" 1 Starkie on Ev. 237-8.

"Inquests of office, depositions and evidence of a judicial proceeding. Such inquests as are of a public nature and taken under competent authority to ascertain a matter of public interest, are under principles already announced, admissible in evidence against the world. They are analogous to an adjudication *in rem*, being made on behalf of the public; no one is properly a stranger to them; and any one who can be affected by them have the power of contesting them:" 7 Am. Ed., 1 Starkie on Ev. 307-8.

Phillip on Evidence says, "There are, however, authorities which hold that depositions taken at an inquest before a coroner, and even if taken in the absence of the accused, may be admitted on the ground that the coroner is a public officer: John Kelynge's Rep. 55, Sir Thomas Jones' Rep. 53; 1 Levinz, 180, and 12 Howard St. Rep. 852, etc. It is unquestionably regular for the coroner to take depositions in the absence of the party who may be afterwards charged with the murder on the inquest as regular, as it is for a justice to take depositions in the presence of the prisoner:" 2 Phillip on Ev., 10th Am. Ed. 239-40, 224; 3 Phillip on Ev. 318 Note.

In *Rex v. Smith*, the court decided that depositions taken in the presence of the prisoner were "regular." The counsel for Smith contended that the Statutes of Phillip and Mary were not followed, as all the testimony was not taken in the presence

of the accused. The testimony was read over to the accused by the justice of the peace. The testimony was admitted as evidence: 2 Starkie Rep. 208.

"The testimony taken before a coroner's inquest is admissible as evidence:" Peake on Ev. 61.

"Depositions of witnesses taken before the coroner on an inquiry touching the death of a person killed by the collision is receivable in evidence in an action for damages, if the witness be beyond the sea:" Greenleaf on Ev. 553, Note.

By the 1 and 2 Phillip and Mary, C. 13, § 15, the coroner is required to take the depositions of witnesses on an inquisition of death and certify it, together with the proceedings, to the Judge at the Assizes. Under this provision the coroner ought to take evidence in favor of the party accused, as well as against him, for the inquiry is not so much like the definition of a grand jury or a bill of indictment, as an inquest of office to ascertain how the deceased came to receive those injuries which proved mortal. The examination thus taken will be sufficient evidence in case the witnesses are dead, unable to travel, beyond the sea, or kept out of the way by the contrivance of the party to whom their testimony is adverse. And it seems they differ from those taken before justices in this respect, that they are admissible, though taken in the absence of the prisoner; because the coroner is an officer on behalf of the public, and will be presumed to have acted properly in all matters within his jurisdiction: 1 Chitty's Criminal Law, 587.

This position that a coroner's inquest is in the nature of a proceeding *in rem* is upheld by Saunders' Pleadings and Practice, 219.

"The testimony and depositions of witnesses taken before a coroner or before the committing magistrate is evidence at the trial in chief:" 1 Wharton on Ev., § 177, 642-7, 812, 2d Ed.

"In this respect there is a striking difference between depositions before a magistrate and before a coroner; for not only *has it been settled*, that if any witnesses who have been examined before the coroner are dead or unable to travel, or kept out of the way by the means and contrivance of the prisoner, their depositions, may be read on the trial of the

prisoner, but the prevailing opinion seems to be that *they are equally admissible, through the prisoner may have been absent at the time of taking the inquisition.* The reasons given for this distinction usually are that the examination before the coroner is a transaction of notoriety to which every one has right of access; and that the coroner is an officer appointed on behalf of the public to make inquiry about the matter within his jurisdiction; and, therefore, the law will presume the depositions taken before him to be duly and impartially taken:" 2 Russell on Crimes, 892.

Taylor (Evidence, § 499) admits that these depositions have been and are used in the subsequent trial.

We will next consider whether these depositions should be reduced to writing to make them evidence. The word deposition as used in the old reports, and the word testimony are synonymous. Peters' Digest of the Common Law gives this definition of a deposition: "In legal language a deposition is evidence given by a witness under interrogatories *oral* or written, and usually written down by an official person."

Depositions of a former witness before a coroner's inquest can be proven by a coroner or clerk, according to Lord Hale, or *now* by any person present at the taking who heard the testimony of deceased witness:" 1 Phillip on Ev. 415, 10th Am. Ed.

"As to the person by whom the *viva voce* testimony may be proved, the American cases agree with the English, that this may be done by any one who heard the testimony, the judge, counsel, jury or bystander, provided he will, on oath, undertake to repeat it in such detail as the practice of the courts may require:" Phillip on Ev., citing authorities.

When this country was settled, preliminary examinations before magistrates and coroners were, in England, regulated by two statutes which were received as common law in Pennsylvania, in Maryland, and probably in the other states generally. They are 1 and 2 P. & M. C. 13, §§ 4 and 5, and 2 and 3 P. & M. C. 10; 1 Bishop on Criminal Procedure, 1198.

IV. SOME PRACTICAL APPLICATIONS.

We will now inquire whether the reason that justified the revival of this old Anglo-Saxon law under Edward I., by the enactment of the statute *de officio coronatis*, after having slept for two hundred years, would be sufficient to enforce this rule of the old common law. "The reason of the law," as Lord Coke said, "is the light of the law." In reading of the early Plantagenet reigns we notice that justice was a mockery, and at times the judges were mistreated. This was caused by the lawlessness of the barons. These ancient highway robbers and sneak thieves would issue from their castles, burning, robbing and committing every crime in the decalogue. To these crimes was always added murder. The coroner of the county would hold an inquest upon the slain. Before this inquest the witnesses would testify. The coroner not obeying the common-law rule—to return the inquest and the testimony to the Court of Eyre on the next circuit—the case being called these criminals would appear and demand justice. The witnesses not appearing and the judges neglecting to enforce this ancient common rule of law concerning testimony taken before a coroner's jury, the accused would be acquitted. Before these barons, however, would demand justice they took "good care" to "interview" the witnesses to know whether they would be present at the trial. After such "interview" the witnesses would be confined in the dungeons of their castles, then with what safety they could demand to meet their accusers face to face!! How horrible the times were can be realized by reading the Chronicles of Henry of Monmouth. In *Ivanhoe* we read of all these crimes, and when the Castle of Forquillstone was stormed how the witnesses of the crimes of Front De Bœuf almost swarmed from the dungeons. Scott's graphic description of the crimes committed by Front De Bœuf, and how he had escaped punishment clearly demonstrated the necessity of such a law as that enacted by IV, Edward I. The enactment of this law and its rigid enforcement in subsequent reigns demonstrates the necessity for it. We never hear after the enactment of *de officio coronatis*

of witnesses being seized. The barons became stronger than ever—the kings weaker—yet justice did not miscarry by the seizure of witnesses by the barons for the next two hundred and ten years. Before the enactment of this statute the wisest and strongest kings of England had been unable to enforce the law, and after its enactment the weakest king could preserve better order than the strongest had before. This statute prevented the miscarriage of justice, and it was a protection to the witnesses; for the accused would prefer to meet the witnesses face to face to being tried on the depositions of witnesses whom they had no opportunity to cross-examine. Witnesses, who were compelled to testify, were under a greater protection than any statute could secure; the defendant as well as the State were solicitous by their welfare. Does any reason exist now for the enforcement of this law? Are the circumstances such that its enforcement is necessary? Are there any barons of modern times, who can kill, and for the lack of witnesses appearing against them at the trial, go free? We think that there is reason and necessity for the enforcement of this law. Instead of barons of flesh, who had souls and were slightly amenable to the good influences of the priests of Christ, we have hundred and thousands of corporations, declared by the law to be soulless—to make money is their sole object, and human labor is but a chattel to be bought and sold as it increases or decreases in value. The laborer is served with notice to appear before a coroner's inquest. He must, under penalty, give all the facts known by him to the jury, and if he dares to testify to facts prejudicial to the interest of the corporation before a coroner's jury, he is at once told to draw his pay and leave. This law not now being enforced a premium is given for perjury. The witness must testify in the interest of his employers, or he is deprived of the chance to earn his bread. Often are the interests of others involved. Nothing is so merciless as money when money is endangered. More merciless than the barons of old, they involve in their vengeance, not only the poor witness, but his family; he sees their bread taken from them, sees them starve, because he has been made to testify that through

their negligence *an animal* has been killed. He and his must suffer, because he has been compelled by the law to testify to facts detrimental to the corporation, and for fear it would suffer the loss of a few paltry dollars. Placed upon a railroad's black list a man can suffer and starve until he is as gruesome as the figure that impersonates famine before he can, under his right name, obtain work at his occupation.

"There is no wrong without its remedy," and, yet cases frequently arise illustrating clearly the necessity for the enforcement of this rule of law making all facts by a coroner's jury *prima facie* evidence of all facts found, and receiving all testimony taken before them as good evidence for or against any one who may be thereby affected, for without this rule of law, wrongs are committed by the thousands without any adequate remedy in the law.

For example :

A switchman, whilst switching in a railroad yard was run over by an engine and killed, leaving an aged and infirm father. At the inquest held over his remains his "mate" testified that the engine used was an old road engine which had a defective footboard, and that the engine was backing at the time of the accident; that upon throwing the switch, the switchman jumped upon the footboard of the engine and grabbed the brake with his hands; the footboard becoming detached from the engine, he held on with his hands at least a minute before falling; that the witness gave the usual signals and hallooed but the engineer and fireman did not heed them. Had the engineer and fireman been paying attention, and had they heeded his calls and signals the engine could have been stopped before the switchman fell; the engineer was looking in the opposite direction to that in which the engine was going, and the fireman was flirting with some girls on the opposite side of the street.

This testimony was corroborated by other witnesses. Upon these facts the coroner's jury returned a verdict censuring the railroad for gross carelessness and binding the engineer and fireman over to the criminal court. The father of the deceased sued the railroad company for damages. Before the verdict of

the coroner's jury was rendered the witnesses were discharged by the railroad. The principal witness (the "mate" of deceased) not being able to secure employment at the place of the accident was traced from place to place in search of work, until all trace of him was lost. Thus a double wrong had been committed and suffering inflicted on both the living and the dead. An employee of the road while acting in the discharge of his duty, guiltless of any carelessness, was without warning, and without fault subjected to a death horrible in the extreme,—an occurrence so frequent on the great railroads of this country that it is considered hardly sufficient to merit a passing comment in the columns of the press. Had the censurable conduct of the railroad stopped here, it would have been passed without comment or rebuke, the courts of the country being now as in the days of King Edward relied on in confidence to deny justice to no man. But an insult to the court is added to the injury of the dead man, and the only witnesses who could prove the facts which would compel a pecuniary compensation for the wrongful act were discharged by the wrong doer and compelled by want of work to seek employment in distant States, where they too perhaps fell victims to the carelessness of a railroad, and where probably again the witnesses to the tragedy were in like manner compelled to go to distant States. Such may be the case of every man who testifies to facts prejudicial to the interest of a railroad. If such testimony is not admissable in a subsequent suit, why should a railroad employee be compelled to place himself in this position? If a coroner's inquest is a "mere form" is it not unjust to compel one who must toil for his daily bread to lose all chances of employment. If the position taken in this article is the law would it not compel the railroads to be as solicitous for the witnesses' appearance at the trial as the accused were when the law was enforced. Would they not desire to meet the witnesses "face to face?" Would it not secure to their employees safety and employment, and make laborers less liable to shirk their duty to their fellow-men? It would make every corporation wish to meet the witnesses face to face in a court of justice, to have the privilege of cross-examination.

and to have a jury pass upon the credibility of such witnesses.

Wonderful it would be, if during a period of six hundred years, embracing all the reports of the common law, we could not find a few opinions to the contrary. In a late case in Illinois depositions taken by a coroner were excluded. Although admitting that depositions could be used under the English Statutes (Phillip and Mary), yet there being "*no implication for its use*" in their statute this testimony was excluded. As the statutes of *de officio coronatis* and Phillip and Mary have not been repealed and in no manner whatsoever conflict with their statute on coroner, (Revised Statutes of Illinois, 1885, Hurd), to arrive at its decision, the court must have repealed the above-mentioned statutes *by implication*. Section 14, page 294 of Revised Statutes of Illinois, directs the jury in almost the identical words of the early English statutes to find out all the facts concerning how the deceased came to receive those injuries which proved mortal: "It shall be the duty of the jurors, as aforesaid, to inquire how, in what manner and by whom or what the said body came to its death, and of *all other facts of and concerning* the same, together with *all* material circumstances in any wise related to or connected with said death and make up and sign a verdict, and deliver the same to the coroner." A recital of the opinion will, with all due respect to the court so deciding, show its fallacy.

"The provision of our statute simply is, "which testimony (before coroners) shall be filed with said coroner in his office and carefully preserved, there being *no implication*, as in the English statute, that the inquisition is for use in court. The cases, in which such depositions have been received, are mostly criminal cases, but they have been received in a civil case (Sill v. Brown, 9 C. & P. 601). The plaintiff was not a party to the proceedings before the coroner, was not present, had no opportunity for the cross-examination of the witness and any question of negligence—the vital question here—was not the very matter of inquiry before the coroner. The legitimate object of the inquest would have been fulfilled in finding simply that death was caused by his being run over by a railroad train, without inquiring whether it was through any

one's or whose negligence. We are of opinion was rightly excluded."

Pittsburgh, Cincinnati & St. Louis Railway Company v. James McGrath Adams, 115 Illinois Rep. 175-6.

The next opinion cited is simply judicial legislation overriding former decisions of the New York Court, and in terms repealing the statute of Phillip and Mary, without ever giving a reason for so doing. Our inference from the language of the court is that, had they ever heard of an *inquisition* they did not fully comprehend its nature and effect. In *M. Cook as administrator of John Cook, deceased, v. The New York Central Railroad Company*, the court held, "The testimony of the witness, John Brennan, before the coroner's inquest, was properly excluded, the inquest was no action or judicial proceeding between the parties in any sense:" 5 Lansing (N. Y.), 406.

In *State v. Campbell*, 2 Richardson, 124, the court held that depositions before a coroner were not admissible on the ground that—"they are *ex-parte*"—"there was no cross-examination by the prisoner's counsel;" cannot see a word in either act, to justify any alteration in the *established* rule of *evidence*;" "that it cannot escape observation that, at most, their resolves were no more than respectable *obiter dicta*, and made before the meeting of the Peers who tried Lord Morley:" 1 Richardson (S. C.), 124.

In conclusion we will cite the dissenting opinion of Justice O'Neill in the last-mentioned case: "Instead of being questioned, until Russell, Starkie and Roscoe wrote, no one dreamed of doubting them. That great and good man, Sir Matthew Hale, in his Pleas of the Crown, 2nd Vol., 284, recognizes the rule in its broadest terms." Judge Buller, in his trials at Nisi Prius, 292, says: "If the witnesses examined on a coroner's inquest be dead or beyond the sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public to make inquiry about the matter within his jurisdiction." In Leach's Crown Cases, 14 Webster's Case will be found, "in which the deposition of an accomplice taken before Lord Chief Justice Lee was allowed to be read

on proof of his death." In the case of *King v. Eriswell*, 3 T. R. 763, it is stated by BULLER, J., that the examination of a pauper, under 13 and 14 Cor. II., was very similar to the case of depositions before a coroner, which has long been settled to be good evidence, *though the person accused be not present when it is taken nor never heard of it till the moment it is produced against him*. Lord Kenyon, who differed from Buller on the point before them, admitted the rule in criminal cases as to depositions before the coroner. For he said: "These exceptions alluded to, meaning depositions taken before magistrates and coroners are founded on the statutes of Phillip and Mary, and that they go no further, is abundantly proved. Besides, the examination before the coroner is an *inquest of office*, it is a transaction of notoriety to which *every person has access*. After such an array of authorities I confess I should as little think of questioning the rule, as I would the first rule of evidence. It is true, Judge Johnson did express a doubt about the admissibility of such evidence, but the point was not before him, and he merely acquiesced in the reasonableness of Starkie's doubt. I attach no consequence to the presence of the prisoner or on his right of cross-examination. Neither of them are of any intrinsic consequence to truth; and then when it is remembered that this is an inquest of office, and that the testimony is only resorted to where God has put out of the power of the State or the accused to have the benefit of a first examination of the witnesses, there can be no reason to complain of its admissibility: "2 Richardson, S. C., 134-5.

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KING ET AL. *v.* ARMSTRONG.¹ SUPREME COURT OF OHIO.

National banks—Insolvency—Liability of stockholders—Set off.

The receiver of an insolvent national bank may set off the claim against a stockholder upon his stock against a dividend due the stockholder or his assignee on the deposit account of the former.

STATEMENT OF THE CASE.

The Fidelity National Bank of Cincinnati became insolvent on June 21, 1887, and on June 27, 1887, Armstrong was appointed by the Comptroller of the Currency receiver to wind up its affairs. The bank was dissolved by decree of the Circuit Court on July 12, 1887.

When the bank failed it owed Brownell a balance on his deposit account of \$3330.52, which, on July 30, 1887, he assigned to King et al., who, on September 15th, made proof of their claim to the receiver and obtained a certificate from him that they were creditors of the bank to the amount of said balance. On November 1, 1887, the comptroller declared a dividend of 25 per cent. on creditors' claims and issued checks for the same, payable to the creditors. Among them was a check for \$832.63, the dividend on the plaintiff's claim. The receiver refused to pay this over. At the time of the failure of the bank, Brownell was owner of fifty shares of stock in it. At the time of the issuance of the certificate of indebtedness to the plaintiffs, the receiver was not aware of Brownell's stock liability. The comptroller's checks were issued with instructions not to deliver them to any one indebted

¹34 N. E. Rep. 163.

to the bank, and he subsequently ordered the amount due on all stock to be collected. *Held*, that Brownell's liability on the stock could be set off against the dividend on the claim.

LIABILITY OF STOCKHOLDERS IN INSOLVENT NATIONAL BANKS.

§ 5151, U. S. Rev. Stat., provides that the "shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another for all contracts debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

§ 5234, U. S. Rev. Stat., provides that the Comptroller of the Currency may, on becoming satisfied that a national bank has refused its notes and is in default, forthwith appoint a receiver, and "such receiver under the direction of the Comptroller shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order may sell all the real and personal property of such association on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made ~~to~~ the Treasurer of the United States subject to the order of the ~~Comptroller~~ Comptroller, and shall also make report to the comptroller of ~~his~~ acts and proceedings."

§ 1, Act of June 30, 1876, provides "that whenever any national banking association shall be dissolved and its rights, privileges and franchises declared forfeited as prescribed in § 5239 of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court, stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of the national banking association, he may after

due examination of its affairs in either case appoint a receiver who shall proceed to close up such association and enforce the personal liability of the shareholders as provided in § 5234 of said statutes."

§ 2 of the same Act provides, "that when any national banking association shall have gone into liquidation under the provisions of § 5220 of said statutes, the individual liability of the shareholders, provided for by § 5151 of said statutes, may be enforced by any creditor of such association by bill in equity in the nature of a creditor's bill brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof in any court of the United States, having original jurisdiction in equity for the district in which such association may have been located or established."

These sections have been quoted, at length, because the personal liability of a stockholder in either a national bank or any corporation, apart from liability for unpaid stock, is purely statutory and is commonly called the statutory liability. The liability of a stockholder for unpaid subscriptions to stock is another matter, and in the case of national banking associations, one that does not usually remain long in abeyance.

It will be seen, from the sections quoted, that the personal liability of the shareholders where the other assets are insufficient for the payment of debts is an absolute one; that the receiver is, in every case where a receiver is appointed at all, the proper person, subject to the direction of the comptroller, to enforce this liability; and that in the case of liquidation, where no receiver is appointed by the comptroller, creditors' bills are allowed.

There is a clear distinction between national banking associations and other corporations in the matter of the statutory liability of stockholders, not so much in the purpose of this liability as in its enforcement. The fund produced from the enforcement of such liability is in all cases called a trust fund for creditors. For national banks, however, in all cases of insolvency, the receiver is the instrument by which it is produced; while for other corporations creditors' bills are the means. It may be difficult to see why the proceeds of this

statutory liability are any less a separate fund for the creditors of a national bank than for those of another corporation, except that Congress has provided but one pocket for the stockholders' liability and the debts due the bank, while State Laws generally have provided two.

In the principal case it was argued that the receiver's rights to claim against debtors of his bank and against shareholders were two distinct rights producing two distinct funds, and that a claim against one of these funds was improperly opposed by a claim due to the other. The court, however, took a different view and after quoting the National Bank Acts, said: "The receiver is authorized to collect from each stockholder the necessary amount up to the full extent of his liability and seems to be charged with that duty. The amount due from the stockholders becomes assets to be administered by him as the other assets of the bank in his hands; and all of the assets, including the individual liability of the stockholders, constitute a trust fund for the benefit of all creditors having valid claims against the bank. It, therefore, becomes the duty of the receiver, under the direction of the comptroller, to so administer the fund as to secure to each beneficiary his just proportion of it. In his trust capacity he is the representative of all the creditors and of the stockholders, both in the collection of the assets and in their proper distribution; and the fund collected from the stockholders goes into that arising from the other assets and is distributed in the same way to the creditors without separation or distinction on account of the source from which it is derived. It altogether constitutes one common fund for the equal benefit of all the creditors according to their respective rights." Usually the set off is claimed by the creditor and the receiver interposes the argument made use of by the creditor in this case.

It would be perhaps as interesting to know why a distinction was ever made between a stockholder's liability on his partially paid-up stock and his statutory liability in excess of his stock, as to learn why, when the distinction was a settled one, it should not be maintained, even though the funds from

the two sources should be intermingled; as in the case of national banks.

The capital stock of a corporation has many times been called, whether rightly or wrongly, a trust fund for its creditors: *Wood v. Dummer*, 3 Mason, 308; *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 808; *Sawyer v. Hoag*, 17 Wall. 610; *Hawley v. Upton*, 102 U. S. 314; 25 Am. Law Review, 749; 25 Am. Law Rev. 940; *Hostes v. Car Co.*, 50 N. W. Rep. 1117; 32 Am. Law Reg. 175.

Notwithstanding the alleged peculiar character of capital stock "especially unpaid subscriptions," such a claim is enforceable by the corporation itself, is an asset of the corporation, and passes by assignment to the receiver or assignee for creditors of the corporation. On the other hand a claim against the corporation cannot be set off against a claim for unpaid subscriptions, because the fruits of the latter are said to be a trust fund for all the creditors ratably. In other words, the stockholder's claim as a creditor is primarily against all of the assets of the corporation except its capital stock. To make a set off valid, the debts must be mutual and in the same right: *Sawyer v. Hoag*, *supra*, and, according to that case, a common debt due by a corporation and a debt due to it under a contract of stock subscription, although enforceable by it, are not owing in the same right, because the latter debt is part of a "trust fund:" *Cook on Stock and Stockholders*, § 193.

The proceeds resulting from the statutory liability also constitute a trust fund "exclusively" for the creditors, differing from the fund produced by the payment of unpaid subscriptions in this, that the creditors may pursue their remedies directly against the stockholders; and, as a corollary to this position, that the proceeds collected under the statutory liability do not form any part of the assets of the corporation, and, on its insolvency, do not pass to the receiver or assignee for creditors, and neither the corporation nor the receiver or assignee can enforce this liability: *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 846; *Cook on Stock and Stockholders*, § 218.

It might innocently be supposed that a fund provided so exclusively for creditors would be hopelessly infected by the trust fund theory, and that, whatever might be the opinion as to the right of set off against the fund of unpaid subscriptions, there could be no such right against the fund derived from the statutory liability; for assuming this latter fund to be what it is called, the debt of the corporation to the stockholder, and his statutory liability are not owing either between the same parties or in the same right. Yet, strange to say, the law seems to be otherwise: *Thompson v. Reno Bank*, 3 Am. St. Rep. 871; *Cook on Stock and Stockholders*, § 225 c.

It may be added that the principles of set off apply in all cases except in suits on stock subscriptions.

There is then this peculiar state of affairs (1) a creditor sued for an unpaid subscription or any other debt by a solvent corporation may set off his claim against the corporation; (2) he may not set off such claim after the corporation has failed, because the stock, "especially unpaid subscriptions," has suddenly become a trust fund; (3) although the fund derived from stockholders' statutory liability is also a trust fund, yet the creditor may set off his claim against it.¹

Do the principles applicable to corporations in general apply to national banks? The question raised in the principal case is peculiar. From the partially collected assets a dividend was declared in favor of a stockholder who sued for it. The set off was his statutory liability. Presumably the case would have been the same had the receiver sued on the statutory liability and the shareholder set off the dividend. And yet he could not have set off another claim against the bank: *Witters v. Sowles*, 32 Fed. Rep. 130-8; *Delano v. Butler*, 118 U. S. 634.

¹This proposition may be somewhat too broadly stated, and may the stockholder always set off his claim? Does not the solution of the question lie in the terms of the statutes imposing this statutory liability, viz: If the statutes impose this liability ratably for *all* creditors, then the stockholder can not, upon insolvency, obtain a preference by setting off the individual indebtedness to himself, but must resort to his proportionate dividend; while, on the other hand, if the liability imposed is personal, special or limited, then the stockholder who is a creditor has as much right to be preferred by retaining an amount which he could have recovered by action, as has any other creditor who sues therefor.

The court took two positions (1) that the argument based on the trust fund theory was untenable in the case of a national bank, and (2) the trust fund theory as declared in *Sawyer v. Hoag* did not apply because the set off did not withdraw any undue amount from the trust fund: *Sowles v. Witters*, 40 Fed. Rep. 413. If the first position was sound, the second position was evasive and unnecessary.

Was the first position sound? The court practically admitted that it could not be done in case of another corporation, and made the distinction that the statutory liability on national bank stock is collectible by the receiver,—all of the assets of the bank being mingled in his hands. But the general assets of another corporation are mixed with the proceeds of the unpaid capital and yet the courts seem to have no difficulty in keeping them separate by means of the trust fund theory. The capital of a national bank is, after the first six months of its existence, always nominally full paid, so that suits on stock subscriptions are usually on the statutory liability; and if the law applicable to general corporations were applied to national banks, it might well be contended that a set off could be maintained, because the liability is the statutory liability. The United States courts, however, seem wedded to their idols, and adhere to the trust fund theory for all stock liability. The point was distinctly raised in *Witters v. Sowles*, 32 Fed. Rep. 138, and the court there held that the assessment is due the receiver only for the purpose of ratable distribution among them. The case of *Delano v. Butler* there cited in support of this position, was decided on the ground that the claim was not a valid one, not that it could not have been set off if it had been valid, although the facts would seem to have warranted this latter.

Because of such irreconcilable authority it is difficult to formulate any rule on the subject. So far as the general liability of stockholders in national banks is concerned the statutes do not leave much room for difference, and the same thing may be said of the method of its enforcement. As to the mutual rights of the parties in suits on stock, the law is not clear, but the weight of authority seems to be that the stock and the

proceeds from statutory liability of the stockholders together form a trust fund for creditors, which cannot be participated in by them, directly or indirectly, until the assets of the bank are all collected, and then only in the proportion of their proven claims. This is of course contrary to the general principles of set off; indeed the whole position is not in close accord with any general principles, but seems based on a set of rules framed for the special purpose. The law which will permit a set off against a solvent corporation suing on its stock subscriptions because the debts are in the same right, and will not permit it after the corporation has become insolvent, because the same debts are not in the same right; which will refuse a set off against a receiver because the debts are not in the same right, but will permit the receiver to have set off a dividend on the debt against the claim on the stock, because the dividend and the claim on the stock are in the same right, while the debt itself and the claim on the stock are not: such a law may work justice sometimes and be firmly established, but certainly does not commend itself for consistency. L. L. SMITH.

NOTE BY A. T. FREEDLEY, Esq.

The alleged inconsistency pointed out in the concluding paragraphs of the above article is probably more illusory than real. In actions for stock subscriptions, set off is allowed when the corporation is solvent, because the debts are due to and from the corporation, and, *prima facie*, the fund is not needed for the payment of creditors. It is refused when the corporation is insolvent, because although one debt is due *from* the corporation, yet the counter debt is due *to* another set of parties, viz: the creditors of the corporation whose rights thereto vest upon insolvency. The same doctrines govern attempted off-sets of debts due by the corporation in actions by receivers for subscriptions, but a set off of *declared* dividends is allowed in actions by and against the receiver, inasmuch as both debts are due to and by the declarant, viz: the receiver. If a debtor when sued should, on general principles, be refused the right to set off a *declared* dividend in his favor the inconsistency would be real; but I do not at present recall such a case.

DEPARTMENT OF EQUITY.

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BIRMINGHAM NATIONAL BANK v. RODEN.¹ SUPREME COURT
OF ALABAMA.

Specific performance—Purchase of stock.

In a suit against a bank to compel it to register plaintiff as a stockholder for forty shares of stock, or pay the value of the stock and the dividends declared thereon as compensation in lieu of the stock, the defendant demurred upon the ground that the plaintiff had a complete remedy at law. *Held*, that plaintiff could in equity enforce a specific performance by having the stock registered in his name and compel the issue of certificates to him or, in the alternative, if the corporation was unable to perform its contract, have his remedy by compensation in damages.

SPECIFIC PERFORMANCE OF CONTRACTS AND THE PURCHASE OF STOCK.

The subject of the specific performance of contracts to purchase stock possesses an ever increasing interest owing to the growth in the number of corporations affording, as these latter do, through their capital stock, a popular medium of investment. Indeed, corporate stock may almost be styled a "commodity," and as it absorbs a large portion of the means of the community it becomes important to see in what way the various principles of equity jurisprudence have been applied to such contracts in cases where the particular relief sought has been their specific enforcement.

First, however, as to the form of contracts for the sale of stock. In England it has been firmly established since the

¹ Reported in 11 So. Rep. 383.

of *Duncuft v. Albrecht*, 12 Lim. 189 (1891), that these contracts are not within the seventeenth section of the Statute of Frauds. In the United States, on the other hand, whenever that section is in force it has generally been decided that it governs such contracts. Especially in this case wherever the words "goods, wares and merchandise" are used. A good illustration of the general opinion is seen in the case of *Myer v. Mitchell*, 60 Me. 430 (1872), which was an action of assumpsit. The question before the court was whether a verdict obtained by the plaintiff in an action to recover damages for the breach of a verbal agreement to transfer to him stock in a certain joint stock company should stand; and the decision was that it could not because such a contract was within the seventeenth section of the Statute of Frauds. For the same view the court found strong support in the opinions in *Stoddard v. Harris*, 20 Pick. 9, and in *North v. Frost*, 10 Conn. 400, from which the conclusion was derivable that there was nothing in the nature of public corporate contracts which in reason or sound policy ought to exempt such contracts respecting them from those restrictions designed by the framers of the Act for the prevention of fraud in the sale of other kinds of personal property.

A similar view has prevailed in the other states: *Fine v. Mansby*, 2 Mo. App. 61 (1876); *Boardman v. Cutter*, 101 Mass. 388 (1880).

An agreement in relation to the sale of stock which is not to be performed within the year comes also under the operation of the statute where that particular provision is in force. Of course, however, when there is an option given, by the exercise of which the agreement may be performed within a shorter time, the statute does not apply. See *Scadden v. Rosenbaum*, 85 Va. 928 (1887).

The question is somewhat of a vexed one and in some of the states it has been practically settled by statutory enactment. Such is the case in those states where capital stock is declared to be personal property: Rev. Stat., Fla., 1892, § 1096; *Southern Life Co. v. Cole*, 4 Fla. 359.

Coming now to the enforcement of stock contracts it may

be well to call attention to the fact that, though capital stock may be an anomalous kind of property, yet contracts of which it forms the subject-matter are not at all a peculiar species governed by a set of exceptional equitable principles and for which there exist separate and rigid rules. Some of the text writers, however, notably Fry, seems to make this very mistake and when they come upon a case wherein the court has compelled specific performance, as in certain cases of railway stock, they treat it as an exception to the general rule. See Tryon Spec. Perf., §§ 24 and 27.

The fact, of course, is that contracts in regard to stock are contracts in regard to personalty and has been well said, "a bill to compel the purchase of stock seeks to secure the transfer of mere personal property and is subject to and clothes the suitor with all the disqualifications which attach to such a proceeding." And see *Cutting v. Dana*, 25 N. J. Eq. 265 (1874). For breaches of personal contracts the pecuniary damages given at law have generally been approved as affording sufficient compensation. And though the doctrine of specific performance usually works out a different result when applied to a contract for the sale of land the principle in both cases is the same. That principle is that unless there is something more involved than the mere breach of a contract equity will not assume jurisdiction since the remedy at law for such an injury is full and adequate.

In a leading case upon the subject under consideration Lord ELMOR made the remark, "It is now perfectly well settled that this court will not enforce specific performance of an agreement for a transfer of stock:" *Nutbrower v. Thornton*, 15 Ves. Such a dogmatic statement is misleading if not erroneous. He probably meant by "stock" government and other public stock, for the term is a generic one in England, having that meaning, the capital stock of private corporations being designated as "shares;" but even in that case the Lord-Chancellor overlooked the progressive spirit of equity jurisprudence and its incompatibility with the laying down in reference to such subject-matter a rigid and unyielding rule. It is time that such contracts will not generally appeal successfully to the discretion of the

chancellor, but the court does not approach the question in the spirit indicated by Lord ELDON. Rather, it takes into consideration that all such stock is practically alike and easily obtainable in the market, and requires the plaintiff to show that his case presents exceptional features, which demand consideration.

As, for example, in the case of *Doloret v. Rothschild*, 1 Lim. & S. 590 (1824), where the court enforced specifically a contract to purchase certain stock of a foreign government upon the plaintiffs showing that it was necessary that he should have the certificates which gave him the legal title. Unless the circumstances present some such peculiar claim upon the chancellor's discretion the plaintiff will be obliged to be satisfied by the pecuniary damages granted by a court of law. As was said in *Eckstein v. Downing*, 64 N. H. 248 (1887), "we do not hold that specific performance of contracts for the sale of stock or shares in a manufacturing company cannot be decreed under any circumstances but the plaintiff has not shown, what it is essential he should show, that he has no adequate remedy at law.

A few moments consideration will show that there are likely to be in contracts for the purchase of government or other public stock in this country but few cases which will present the required exceptional features, and that in the majority of cases the contract will be practically no more than a contract in regard to personal property for a breach of which an adequate remedy at law exists. So that following the principle above stated the courts have rarely granted the prayer for a decree that such a contract should be specifically enforced: *Ross v. Union Pacific Ry. Co.*, 1 Woolw. 26 (1863).

STOCK OF PRIVATE CORPORATIONS.

Where the remedy at law is plain, adequate and complete courts of equity will not enforce contracts for the purchase or transfer of shares of stock in private corporations: *Jones v. Newhall*, 115 Mass. 244 (1875). But such contracts have much to differentiate them from the class just considered. As was well said by the vice-chancellor in *Duncuft v. Albrecht*:

"There is no sort of analogy between public stock, as it may be called, and a certain number of railway shares of a particular description which are limited in number and which cannot always be had in the market."

In the United States the capital stock of private corporations is by far more largely the subject of contract than public stock; and it requires but little thought to see that the character of the former and the circumstances surrounding particular cases much frequently appeal successfully to this favorable consideration of the chancellor in the matter of specific performance. A good illustration of this is found in the case of *Treasurer v. Commercial Coal Mining Company*, 23 Cal. 391 (1863), which was a suit to compel the defendant to issue a certificate for forty-six shares of its capital stock which it had contracted to issue to the plaintiff and others in return for a mining claim located by them. It was argued that a court of equity would not compel the specific performance of such contracts, but the court, while admitting a general rule to that effect where public stocks were concerned took a different view of the case at bar. "In the peculiar condition of business and mining operations in this state where numerous mining and other corporations are in existence, whose stock is often of fluctuating and uncertain value, and where certain kinds of stock have a peculiar value to those acquainted with [the affairs of different companies] where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great. Courts should be liberal in extending the full, adequate and complete relief afforded by a decree of specific performance." (*Frue v. Houghton*, 6 Colo. 318 18 .)

This is the principle upon which relief was granted in the case of the famous *Pusey Horn* and the silver altar-piece of the *Perceys*, namely, that the subject-matter possessed a peculiar and unique value for the plaintiff. Sometimes, however, the court makes use of the fact that the subject-matter is peculiarly valuable to the defendant. This is seen in a case in which the plaintiff sought to enforce a contract whereby

the defendant who had sold her some stock represented by shares in a certain steamboat agreed in case of a misunderstanding arising between them to take the stock off of her hands. The misunderstanding when it arose extended even to the performance of the contract. The court, however, compelled the defendant to carry out his undertaking on the ground that were the position reversed, he could have compelled the plaintiff to allow him to repurchase the stock inasmuch as it was of a peculiar kind which could not be obtained elsewhere: *Bumgardner v. Leavitt*, 35 W. Va. 194 (1891).

When the contract relates to the stock of a company not yet chartered the case has been held to make a special demand upon the consideration of the court. In *Austin and the North Carolina Railroad Company v. Gillespie et al.*, 1 Jon. Eq. 261 (1854), the defendants had agreed that, if the plaintiff (Austin) would subscribe unconditionally for certain stock in a corporation just being organized, they would later take part of it off of his hands by subscribing for it in their own names.¹ The plaintiff carried out his part of the program but the defendants afterwards refused to relieve him. The court made a decree for the specific performance of the contract on the ground that this was a case which differed materially from that of a company already in existence whose stock was on the market and was represented by a definite sum of money. "Here the company was just struggling into life and the subscribers for its stock were taking upon themselves very heavy burdens with a dim prospect of future advantage and it would be impossible to give the plaintiff in an action at law damages at all commensurate with the injury he might sustain by the failure of the defendants to perform their contract."

Where the company, however, after securing its charter, seeks to compel a subscriber to take the shares he contracted for the case is different, as there is only one party to the contract: *Strasburg Railroad Co. v. Echternacht*, 21 Pa. 220

¹It is well settled that such contracts are valid and binding: *Meyer v. Blair*, 109 N. Y. 600 (1895); *Morgan v. Struthers*, 131 U. S. 246 (1889).

(1853), in some of the states, however, the subscription contracts have been enforced.

Whenever a trust is involved in a contract for the sale or transfer of stock, a court of equity will always compel the defendant to specifically perform his agreement. As in the case of *Chafee v. Sprague*, 16 R. I. 189 (1886), in which it was sought to enforce a contract to transfer certain corporate stock as collateral security for the performance of the conditions of a trust deed. The court took the position that, though it was a contract relating to personalty, yet as the property in question was contracted to a trustee in aid and enforcement of the provisions of a trust mortgage, they would assume jurisdiction and enforce the contract specifically: *Dousman v. Wisconsin, L. S. M. & S. R. Co.*, 40 Wis. 418; *Johnson v. Brooks*, 93 N. Y. 337 (18); *Weaver v. Fisher*, 110 Ill. 146 (1884).

Courts of equity likewise approve strongly of family compromises, and if the transfer of stock is one of the considerations for such a contract, the plaintiff will not appeal in vain for relief: *Leach v. Forbes*, 11 Gray, 506 (18).

So, too, if the defendant is insolvent or not pecuniarily responsible, so that practically he cannot respond in damages, the chancellor in the exercise of his sound discretion may make the desired decree: *Draper v. Stone*, 71 Me. 175 (1880); *Avery v. Ryan*, 74 Wis. 591 (1889).

Where the defendant puts it out of his power to fulfill his contract the court may compel him to accept compliance on the part of the plaintiff and be liable to him in damages for the value of the stock: *Burton v. Shotwell*, 13 W. Bush, 271 (1877). Such contracts are, of course, subject to the general principles of courts of equity, and the exercise of the high prerogative under consideration will be denied where the contract is not equally enforceable against either party as, for instance, in the case of *Danforth v. Phila., M. S. L. Ry. Co.*, 30 N. J. Eq. 12 (1879), where the court was asked to compel the defendant to transfer certain stock which it had agreed to convey in return for services in the building and equipment of the road. In such a case it would be entirely outside the

province of a court of equity to compel the plaintiff to perform his contract, and consequently he cannot have such relief himself. See 45 N. J. Eq. 122.

Nor will the court lend its aid where the bargain is unconscionable or where it is sought to keep the stock afloat for speculative purposes: *Mississippi & Missouri Railroad Co. v. Cromwell*, 91 V. S. 643 (1875).

Nor again will the court interfere where its decree would be nugatory as is seen in the principal case. There, though the contract was binding and in other respects enforceable, yet as decree for specific performance could only have been enforced by compelling the defendant to issue additional shares of stock, when in fact it had already issued all that by law it was allowed to issue, the court declined to do more than grant the alternative relief prayed for, that is, compensation in damages.

The case of *Foll's Appeal*, 91 Pa. 434 (1879), is interesting as showing how carefully the court probes contracts for the sale of stock when asked to enforce them. In that case the plaintiff was endeavoring to get control of a majority of the stock of a certain national bank. He, with two others, had borrowed sufficient money and purchased almost the required number of shares, and the few remaining shares he had contracted for with Foll. Foll refused to fulfill his contract, and the plaintiff filed his bill for specific performance to compel him to sell and deliver the shares in question. The court below made a decree in accordance with the prayer of the bill, but this was reversed on appeal on the ground that it was against public policy to interfere to place one man in control of an institution such as a national bank. The plaintiff might secure control if he could, but a court of equity would not help him. The court, Mr. PAXSON, J., went further, and said that it knew of no instance in Pennsylvania in which a court of equity had decreed specific performance of a sale of stock, and the same statement appears in a later case where the court enforced specifically the right of a stockholder given by statute to subscribe to new stock at par: *De la Cuesta v. Insurance Co.*, 136 Pa. 62, 78 (1890). But the facts of the

Pennsylvania cases warrant no stronger proposition than this, that a court of equity will not enforce specifically a contract for the sale and purchase of stock where other shares of the same kind can be bought in the market.

The authorities above cited, when carefully considered, seem to establish the proposition that the granting or withholding specific performance of a contract for the purchase of corporate stock in any given case, while depending indirectly upon the character of the property involved, is governed by the answer to the question whether or not there is an adequate and complete remedy afforded by an action at law. And see *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365 (1879). This will, of course, depend upon circumstances, but it may be safely said that if the stock in question has no fixed marketable value, is not commonly offered for sale, and is actually rarely sold, a contract for its sale or transfer will generally be specifically enforced. It must not be forgotten, however, that such relief rests in the sound discretion of the chancellor, and that general rules on such subjects are apt to be misleading, for a court of equity will "grant or withhold relief according to circumstances of each particular case when general rules will not furnish any exact measure of justice between the parties." See 2 Story Eq. Jur. § 742.

The reason for Lord ELDON's dogmatic assertion seems to have been overlooked. It is that a purchaser of personal property that has a *market* never should have the aid of Chancery to give specific performance, unless there are circumstances such as justify that remedy, and these are that the property cannot be bought. The reason for applying the remedy in case greatly is this, and the necessity of being able to rely on the capacity to get in the title to the particular property.¹ It is quite likely that this wise rule will, like so many others, be frittered away for want of appreciation of the true foundation of the rule giving specific performance.

¹ Without it no one could venture to touch property held merely by contract. Possession which perfects the title to personalty amounts to nothing in case of land.

DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.

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HARTFORD FIRE INS. CO. v. KAHN.¹ SUPREME COURT OF WYOMING.

Under Rev. Stat., Wyoming, § 2447, providing that a petition must contain a statement of the facts constituting a cause of action in ordinary language, an exhibit attached to a petition, and therein referred to as a part thereof, is not a part of the petition, and cannot be referred to to determine its sufficiency, or to supply allegations omitted therefrom.

It would seem that such a system of pleading is objectionable, as permitting the pleading of evidence.

EFFECT OF EXHIBITS ON PLEADINGS.

I. *At Common Law.*—The practice of supplementing, and even supplying the allegations of a pleading by means of exhibits has become so prevalent, and has also been so far abetted by statute, that the true function and powers of an exhibit have been almost lost sight of. The pseudonymous "reforms" and unjustifiable innovations that have in the past few years so unsettled the well-established rules of pleading as to make them unrecognizable by their own progenitors have been the prime cause of this pernicious habit. How much easier to say, "Plaintiff claims of defendant five hundred dollars, as per the book account annexed," leaving the debtor at the head of the account do duty for the very essential averment that defendant is justly indebted, than to set out the same facts in the proper language of a declaration! Not that such a practice is justifiable, but when so much carelessness

¹ Reported in 34 Pac. Rep. 894.

and inaccuracy is permitted it naturally leads to extremes, and the instance given is one that may any day occur, if indeed it has not already happened, as the legitimate result of the indiscriminate wiping out of the old system of pleading, which, whatever may have been its faults, was what the new, reformed, amorphous scheme of allegations never can be, scientific and effective.

Under that system no mere tacking on of a paper could aid the omissions or errors of a pleader. The proper use and purpose of an exhibit, then as now, was merely to set forth, in detail, that which was alleged in more general terms, or to embody in the record such facts as would in legal effect amount to the facts as alleged in the pleading, or to aid the allegations in fixing more accurately and definitely their import, but not to supply the omission of allegations necessary to present a good cause of action: *Burks v. Watson*, 48 Tex. 107. In general, therefore, an exhibit cannot supply any deficiency in the allegations of the pleading. If the latter be insufficient in any respect, the filing of an exhibit cannot make it good: *Mayer v. Signoret*, 50 Cal. 298; *Knight v. Turnpike Co.*, 45 Ind. 134. It forms no part of the pleading, and cannot be considered on the question of its sufficiency: *Hadwen v. Ins. Co.*, 13 Mo. 473; *Curry v. Lackey*, 35 Mo. 389; *Harlow v. Boswell*, 15 Ill. 56; *Bawling v. McFarland*, 38 Mo. 465; *Poulson v. Collier*, 18 Mo. App. 583; *Pool v. Sanford*, 52 Tex. 621. Not even if the pleader expressly states that it is part thereof: *State v. Samuels*, 28 Mo. App. 649. The pleading must embody in itself, without reference to any other paper, the facts which constitute the cause of action: *Lynd v. Caylor*, 1 Handy (Ohio), 576; *MacDonell v. Railroad*, 60 Tex. 590; *Contra, Pefley v. Johnson* (Neb.), 46 N.W. Rep. 710. Any instrument upon which the pleading is based should be stated therein according to its tenor or legal effect. *Fitch v. Cornell*, 1 Sawyer, C. Ct. 156; *Oh Chow v. Hallett*, 2 Sawyer, C. Ct. 259; *Excelsior Drainage Co. v. Brown*, 38 Ind. 384; *Etchison Assn. v. Hillis*, 40 Ind. 408; *Marshall v. Hamilton*, 41 Miss. 229. And if this be not done, but the attempt be made to supply the failure by

annexing the instrument as an exhibit, it will be stricken out on motion, as impertinent and irrelevant: *Oh Chow v. Hallett*, *supra*, a reformation of the pleading will be reduced; *Crawford v. Satterfield*, 27 Ohio St. 421. Or the exhibit will simply be disregarded, and the pleading dealt with on its merits: *Oliphant v. Malone* (Ark.), 15 S. W. Rep. 363.

This is especially the case where the exhibit would otherwise be mere matter of evidence. The annexation of a deed to a pleading merely tends to amplify the latter, and does not make the deed evidence in the cause, if otherwise inadmissible: *Shepard v. Shepard*, 36 Mich. 173. Nor, even if it be evidence, will it dispense with the proof of delivery: *Barkholder v. Casard*, 47 Ind. 418. So, an account filed with a declaration is no part of it, and should not be allowed to go to the jury: *Ingalls v. Crouch*, 35 Md. 296. When an answer attempts to plead in defence a judgment in an action between the same parties on the note sued on, but fails to show what were the matters in controversy, or what was the judgment recovered, a copy of the entries of the justice of the peace in the first suit, filed with the answer, but forming no part thereof, does not supply the omission: *Oliphant v. Malone* (Ark.), 15 S. W. Rep. 363.

The courts of Texas have adopted a very sensible rule, which refuse to permit exhibits to relieve the pleader from making the proper allegations of which the exhibits may be the evidence: Rule 19, Dist. Ct. Tex. This is nothing but a restatement of the common law rule; but the fact that such a rule was considered necessary shows how completely the principles of common law pleading had become obscured by the laxity consequent upon innovation. Under this rule, it is held that a declaration for services rendered, which, except by reference to an exhibit, contains no allegations as to the character of the services, the time, dates, items, and amounts due therefor, is insufficient: *Niles v. Mayo* (Tex.), 16 S. W. Rep. 540.

As exhibits cannot supply a deficiency in pleading *a fortiori* they cannot, if attached to a demurrer, raise grounds of objec-

tion not existing in the pleading demurred to: *Buddick v. Marshall*, 23 Iowa, 243.

But though it cannot supply omissions, an exhibit may explain, amplify, or even counteract allegations defective in other respects. The averments of a pleading may be made certain by a reference to diagrams filed with and made a part of the pleading: *Booker v. Ray*, 17 Ind. 522; *Kenny v. Municipality No. 2*, 12 La. Ann. 500. An exhibit, containing an itemized statement of property and values, may be used to explain a general allegation of indebtedness (and may save the pleader the necessity of furnishing a bill of particulars): *Rider v. Robbins*, 13 Mass. 284; *Caspary v. Portland*, 19 Oreg. 496; S. C., 24 Pac. Rep. 1036. And justifies the admission of evidence in support of the items appearing in it: *Lockhart v. Morey*, 41 La. Ann. 1165; S. C., 4 So. Rep. 581.

A copy of a note annexed to a complaint, and referred to in the body of the complaint as an exhibit, may properly be referred to by the court to ascertain the form and contents of the note: *Ward v. Clay*, 82 Cal. 502; S. C., 23 Pac. Rep. 50. An allegation that a certain written and printed contract, a copy of which is annexed to the complaint, contains the terms and conditions of the agreement between the parties, is an allegation of fact that the terms and conditions contained in the annexed paper were agreed on between the parties: *Bishop v. Empire Transp. Co.*, 33 N. Y. Super. Ct. 99. And when several defendants are sued, and judgment is prayed against all *in solido*, the defect of the petition in not specifically alleging that one of them is indebted, is cured by annexing and making part of the petition a bond exhibiting his liability, by his answer without exception, and by the admission of proof without objection: *McLellan Dry Dock Co. v. Farmers' Alliance Steamboat Line (La.)*, 9 So. Rep. 630.

An exhibit may prevent a variance: *Peters v. Crittenden*, 8 Tex. 131; *Greenwood v. Anderson*, 8 Tex. 225, and will control and cure any misdescription of it in the body of the petition: *Pyron v. Grinder*, 25 Tex. 159; *Spencer v. McCarty*, 46 Tex. 213; *Longley v. Caruthers*, 64 Tex. 287. When the instrument sued on is made part of the petition, the

court will give it the legal effect to which it is entitled, though it may have been misconceived by the pleader: *Beal v. Alexander*, 6 Tex. 531. It has ever been held that if an exhibit is referred to in a pleading, and its inspection shows facts contradictory of the allegations thereof, the exhibit will control on demurrer, and not the allegations of the pleading: *Freiberg v. Magale*, 70 Tex. 116; S. C., 7 S. W. Rep. 684. This can only be true, however, when the exhibit is material to the pleader's case, and shows clearly on its face that the allegations of the plea are untrue.

Though the practice of pleading exhibits is improper and pernicious, yet, if the case has been permitted to go on to judgment without objection, and the pleadings themselves contain facts sufficient to constitute a cause of action, the judgment will be allowed to stand: *Crawford v. Satterfield*, 27 Ohio St. 421.

II. *Under Statutory Provisions.*—This question has become of great importance, in view of the almost universal statutory requirements that copies of certain instruments be filed with the pleadings based upon them. Are such provisions so far derogatory of the common-law rules of pleading as to permit the neglect of averments otherwise necessary, and the supplying them by the instrument filed, or must the old rules still be observed?

It must be noticed in the first place that these provisions seem for the most part to have no reference to pleading. The instruments to be annexed to the pleading are mainly those of which oyer could not be had, and as to which, of course, the defendant had no means, in many cases, of preparing a full defence. The statute was made for his benefit, not to relieve the plaintiff from any duty that lay upon him; and on general principles, therefore, such provisions ought not to relieve him from the obligation of properly stating his cause of action.

Accordingly, in many of the States where this question has been raised, it has been decided that the annexation of the required instrument as an exhibit does not supply the omission of material averments in the pleading; that the pleadings, and the pleadings alone, must state the material facts neces-

sary to constitute the cause of action or the defence relied on; and that if they do not they will be demurrable: *Dodd v. King*, 1 Metc. (Ky.) 430; *Hill v. Barrett*, 14 B. Mon. (Ky.) 83; *Vaughn v. Mills*, 18 B. Mon. (Ky.) 634; *Larimore v. Wells*, 29 Ohio St. 13; *Johnson v. Home Ins. Co.*, 3 Wyo. 140; *S. C.*, 6 Pac. Rep. 729; *Hartford Fire Ins. Co. v. Kahn* (the principal case) (Wyo.), 34 Pac. Rep. 894.

In Arkansas, the matter seems to be undecided: *Railroad v. Park*, 32 Ark. 131, held that the exhibits required by statute formed no part of the pleadings; but in *Abbott v. Rowan*, 33 Ark. 593, it was suggested that on demurrer they might be considered part of the record, and in *Beavers v. Baucum*, 33 Ark. 722, it was definitely ruled that such exhibits would even control an averment in the pleadings. Yet this does not say that they will supply a material omission.

In Indiana, however, under the wording of the statute, Rev. Stat., § 362, it has been expressly decided that when the required exhibit is filed it becomes a part of the pleadings, and its contents need not be stated: *Mercer v. Hebert*, 41 Ind. 459. The same appears to be the case in Illinois: *Nauvoo v. Ritter*, 97 U. S. 389.

If the instrument is wrongly set out in the pleading the exhibit controls: *Cotton v. State*, 64 Ind. 573. But it is acknowledged everywhere that an exhibit, not required by statute, is not a part of the pleadings: *Fuller v. Railroad*, 18 Ind. 91; *Armstrong v. McLaughlin*, 49 Ind. 370; *Watkins v. Brunt*, 53 Ind. 208; *Logansport v. La Rose*, 99 Ind. 117; *Dumbruld v. Rowley* (Ind.), 15 N. E. Rep. 463; *Plunkett v. Black*, 117 Ind. 14; *S. C.*, 19 N. E. Rep. 537; *Ross v. Menefee*, 125 Ind. 432; *S. C.*, 25 N. E. Rep. 545; *Barnes v. Mowry*, 129 Ind. 568; *S. C.*, 28 N. E. Rep. 535; *Dukes v. Cole*, 129 Ind. 137; *S. C.*, 28 N. E. Rep. 441; *Railroad v. Smith* (Ind.), 29 N. E. Rep. 1075; *Abbott v. Rowan*, 33 Ark. 593.

In general, therefore, it may be taken as the rule of the common law, still prevalent except where expressly altered by statute, that while an exhibit may be regarded as a part of a pleading for the purpose of explaining, amplifying, or particu-

larizing, or even, in special cases, for the purpose of correcting erroneous allegations therein, it can never be resorted to to supply the omission of a material allegation.

III. *In Equity*.—The rule in equity is that exhibits become part of the pleadings, and serve to help out allegations therein, in case they do not give some necessary particulars of the writing exhibited, or do not state its effect with accuracy: *Brown v. Redwyne*, 16 Ga. 67; *Bolton v. Flourney*, R. M. Charl. (Ga.), 125; *Mintier v. Branch Bank of Mobile*, 23 Ala. 762; *Surget v. Byers*, 1 Hempst. 715; *Armitage v. Wickliffe*, 12 B. Mon. (Ky.), 488. As a corollary such an exhibit will, on demurrer, control the allegations of the complaint: *Buckner v. Davis*, 29 Ark. 444. Yet, if the bill show a cause of action on its face, the court will not look to the exhibit for the purpose of contradicting its allegations, and so making a demurrer effective: *Terry v. Jones*, 44 Miss. 540; *Holman v. Patterson*, 29 Ark. 357.

Some few cases have controverted this view. In *King v. Trice*, 3 Ired. (N. C.) Eq. 568, it was attempted to assimilate the equity rule to that of the common law, and it was held that the contents of the exhibit should be set out sufficiently in the pleading to which it is attached. "The purpose of annexing exhibits is not to enable the pleader to make the pleadings mere skeletons, not in themselves containing the facts and points in controversy, but to obtain an admission of their genuineness from the other side, and for greater certainty as to their contents, and as aiding in the construction from the context." So, in *Buck v. Fisher*, 2 Colo. Ty. 182, it was held that complainants who sue as representatives of an estate should show that they are such in the bill, and it is not sufficient that the fact should appear in an exhibit attached thereto. This may be true of a fact in which the right to maintain the action depends; but in regard to any other facts the equity rule undoubtedly is, as shown by the cases cited above, that an exhibit becomes part of the pleadings, and will aid them, not merely by explaining and supplementing them, but by supplying omissions therein.

NOTES AND COMMENTS ON RECENT DECISIONS.

IMPUTED NEGLIGENCE.

Persons riding in private vehicles, etc., at invitation of owner.

The Supreme Court of Montana in *Whittaker v. City of Helena*, 35 Pac. Rep. 904, has recently added itself to the few courts which uphold the erroneous doctrine that a person who is riding in a private vehicle at the invitation of the owner is chargeable with the contributory negligence of the latter. This decision is not supported by any independent reasoning, but rests wholly on the authority of *Prideaux v. Mineral Point*, 43 Wis. 513. That case argues the matter as follows:

"One voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance, for the time being, as one's own, and assumes the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it."

This case, however, stands almost alone, and is opposed to an overwhelming weight of authority, as was clearly shown by an annotation on this very subject in Vol. 32 of this *MAGAZINE*, p. 763; and is moreover opposed to every principle of law and justice. One person cannot be held responsible for the acts of another unless there is some relation between them that will make those acts in legal effects the acts of the former. The only relations that have this effect are those of principal and agent, including master and servant, and that anonymous relation, akin to conspiracy in criminal law, which exists between those engaged in the prosecution of a joint enterprise, and by which each, though equally a principal with the others is also, to all intents and purposes, the agent of each of them.

It is manifest that this latter relation cannot exist between the driver of the vehicle and the one who rides in it at his invitation. That point has never been seriously urged, and could not well be, in face of the plain facts. Nor is it much more reasonable to hold that the driver is the agent of the one riding with him. In order to constitute the relation of principal and agent, there must be a right in the former to control the latter. A free agent has no principal. And in cases like the one in point it will hardly be contended that the passenger, as we may call him, has any right to control the motions of the driver. He may remonstrate, he may refuse to ride with him, he may, in short, use any and all means of persuasion at his command, or even use words of control, but the driver is under no obligation to obey him, and it is this obligation to obey that constitutes control in the legal sense.

There is no trust in the acceptance of an invitation to ride that will exonerate another whose negligence contributes to the injury. It is difficult to see what is meant by the word trust in such a connection. Neither does the rider accept the conveyance for the time being as his own, for this implies control, and there can be no control from the very nature of the case. It would be much more reasonable to hold that the hirer of a public hack or cab adopted that conveyance as his own, and in fact the hirer in such case does exercise some control, at least as to his destination. But in this latter case, the mere fact of hiring, by the almost unanimous assent of the authorities, does not make the driver the agent of the hirer; and this doctrine has been affirmed by the Supreme Court of the United States: *Little v. Hackett*, 116 U. S. 366.

A fortiori, then, one who rides in a private conveyance on invitation cannot in any sense of the word make the conveyance his own, or make the driver his agent. To quote the language of a well-considered case, one on all fours with the case under discussion, and in which the whole ground was carefully reviewed, "where, as in this case, the passenger has no control over the driver, and does not own the vehicle, and is without blame, and there is no ground in truth and reality for holding him to be the principal or master, there is neither

reason nor justice in holding him bound by the contributory negligence of the driver:" R. R. v. Hogeland, 66 Md. 149.

There is the additional consideration that there has never been an attempt to extend this doctrine to the case of direct negligence on the part of the driver. Yet a master is responsible for the negligence of the driver of his own carriage; and if the driver is the agent of the invited passenger for contributory negligence why not for all other purposes? "It is a poor rule that won't work both ways," as the author of the annotation heretofore alluded to very justly remarks; and that maxim applies with great force to the present case. Certainly, to hold that the driver is an agent for one purpose, and not for another, is inconsistent to a marked degree, and would seem to betray a consciousness of the inherent weakness of the former position.

The question, therefore, does not seem to have had full presentment or consideration in the Montana Case; and it is to be hoped that when it comes before the court again, if that should happen, that the present decision will be overruled, and a doctrine announced more consonant with authority, with reason and with justice.

The foregoing remarks apply only to the imputation of negligence as matter of law, resting on the relation between the parties. The passenger may be negligent on his own part, by riding with a driver known to be reckless or in a vehicle known to be unsafe, by not keeping a proper lookout for danger, or by encouraging the driver to expose them both to risk. But these are wholly different considerations, and do not apply to or affect the question of imputation.

ARDEMUS STEWART.

EQUITY CASES.

Trustee ex-malicio following trust funds.

An interesting opinion was handed down by the Supreme Court of the United States in January last in the case of *Angle v. Chicago, St. Paul, etc., Ry. Co.*, reported in 151 U. S. 1.

Angle had contracted with what the opinion calls the Portgage Company to complete the construction of its road within a time specified by the Legislature of Wisconsin as a condition upon which a certain land grant to the company depended. He was pushing the work vigorously and apparently, would undoubtedly have finished it within the specified time. A rival company, called the Omaha Company (the defendant), was desirous of securing the grant for itself and by outrageous frauds compassed its designs by inducing the Legislature to pass an Act before the time allowed the Portgage Company had expired revoking the grant to that company and bestowing it upon the Omaha Company. The result of their efforts was that Angle's work was arrested, his material seized by the creditors who were supplying them, his laborers scattered and all profit which he would have received was lost to him. He thereupon sued the Portgage Company in an action at law and obtained judgment, and upon execution being returned *nulla bona*, he filed his bill in equity to reach the land in question in the Omaha Company's hands. The defendant filed a demurrer to the bill, the effect of which was to admit the fraud and conspiracy charged, *i. e.*, that the officers of the Portgage Company had been bribed by the Omaha Company to betray their trust by placing the entire outstanding stock of the former under the control of the latter, and that the Legislature had been induced by false allegations as to the progress of the work to revoke the grant to the Portgage Company and to bestow it upon the Omaha Company. The defendant relied upon the Act of the Legislature as a bar to subjecting this land which had been given to them to the debts of the company from which it had been taken away. The argument was that to allow the plaintiff to recover was to impeach the validity of the Act contrary to the established rule that whenever an Act of the Legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency or the motives of the legislators, or the reasons which were spread before them to induce the passage of the Act, a rule which rests upon the principle of the independence of the

Legislature as one of the co-ordinate departments of the government. (*Fletcher v. Peck*, 6 Cranch, 87.) The reply of the court to this was that the wrongdoing of the Omaha Company preceded the Act and that a remedy for that wrong once in existence could not be destroyed unless the Legislature had the power either to condone the wrongs or acting in a judicial capacity to decide that these wrongs gave no cause of action. Such power, of course, could not be claimed.

The defendant also raised the objection that in an action at law the defendant might obtain satisfaction for his injuries. To this the court answered that under the circumstances the remedy at law was not adequate, and they went even deeper into the principles involved. "Waiving the question as to the solvency of the Omaha Company and assuming that any judgment against it could be fully satisfied by legal process then remains a proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure by wrongful acts, and further, as these lands were given to aid in the construction of this road the defendant became a trustee *ex-malificio* in regard to them, and the plaintiff could pursue them into its hands since in good conscience he is entitled to them to the extent of the payment for his work of which the defendant unjustly deprived him by its method of obtaining the property.

Mr. Justice HARLAN dissented on the ground that Angle should have kept on with his work for it was not clear that his injury was the direct result of the defendant's acts, "the attempted revocation by the Legislature and the loss by the company of credit in financial circles do not in law hold the relation of cause and effect." Further, he agreed with the counsel for the defence that to allow the plaintiff to succeed was to impeach the Act of the Legislature, for upon the principle of the adjudged cases all intrinsic evidence in regard to statutes must be excluded and the court must presume that the Legislature was in possession of every fact affecting justice of such legislation.

It would seem, however, that the opinion of the majority is

sound and that, though affected indirectly, the Act of the Legislature was in fact independent of the case. The wrong was done, the right to have it remedied arose and the defendant ought not to be allowed to use the Legislature as a shield for his wrong nor to insist that it could take away the plaintiff's remedy here any more than it could deprive him of any of his other property without compensation. Moreover, there was nothing in the case to indicate that the Legislature had given the land to the Omaha Company other than freely and with no restrictions exempting it from the usual incidents of liability for its possessor's wrongdoing. On well defined equitable principles the defendant was plainly a trustee and answerable in a court of equity for the wrongs he had done.

R. P. BRADFORD.

CONSTITUTIONAL LAW.

The police power—Preservation of game and fish.

A Statute of New York (Laws of N. Y., 1880, Chap. 591, as amended by Laws of 1883, Chap. 317), prohibits the taking of fish in certain waters within the jurisdiction of that state otherwise than by "hook and line or rod held in hand," declares "any net, pound, etc.," a public nuisance, empowers any person, and imposes upon the game and fish wardens the duty to abate and summarily destroy such nefarious devices.

In *Lawton et al. v. Steele* (14 Sup. Ct. Rep. 499), the constitutionality of this Act has been contested before the Supreme Court, and Justice BROWN delivered its opinion upholding the Act, Chief Justice FULLER and Justices FIELD and BREWER dissenting.

Of course, the validity of such a law as this rests upon that oft-times conveniently indefinite and elastic power of the state, the police power, applying as it has been held to do to circumstances so various that they include the compulsory vaccination of children and the suppression of obscene literature. It must be confessed that the application of the police power to some of the decided cases is of somewhat doubtful propriety.

The preservation of game and fish, however, seems and has

frequently been held, a distinctly proper subject for its exercise, especially when it is remembered that uniform national game laws are out of the question on account of the widely varying conditions in different parts of the country.

So much for the general classification of the legislation. The object of the law being of acknowledged wisdom and validity, are the means directed for enforcing it proper and constitutional?

The objection upon which the plaintiffs mainly relied was that the statute deprived them of their property without due process of law. They were fishermen whose nets had been found set (in violation of the Act) and promptly destroyed by the defendant, a game and fish protector. The court found that "the only real difficulty connected with the Act was the right it gave to *summarily destroy*" the confiscated nets, and met and overcame this difficulty by recognizing the eminently practical mode of preventing such a nefarious practice that such destruction presented, which, taken together with the fact that the articles destroyed were of comparatively slight value, distinguished the case from those which hold judicial proceedings necessary before condemnation.

Undoubtedly a rigid application to the facts of this case of the general principle that property cannot be taken and destroyed without due process of law, if by the latter is meant judicial proceedings, must result in the conclusion that the Act is unconstitutional. But where the general purpose sought to be accomplished by the law is one preeminently popular with all classes of law abiding citizens, and the only persons against whom its provisions operate are those who stand practically outlawed, it would be pointless and absurd to throw about the latter the protection afforded by a general principle. Of course, the comparatively slight value of the property taken, considered alone, should not exempt it from a rule which applies to property of greater value, but it is at least to be regarded as an element in forming a conclusion as to the best and most effective means of carrying the law into effect. The occupation of the poacher is one that is very difficult to put a stop to. The only thorough means of accomplishing this would seem to be to

destroy the means by which it is carried on. If it were necessary to go through a judicial process of condemnation, it is not likely that the purpose of the law would be very effectually accomplished.

The decision seems to us a fortunate departure from a general principle, and throws new light on the general subject of "due process."

W. S. E.

The quo warranto proceeding in the New Jersey Senate contest.

The recent contest for the New Jersey Senate which culminated in an action of quo warranto to determine in whom vested the title to the presidency of that body is of general political rather than general legal interest. A large part of the case, also, depended upon the interpretation and construction of certain clauses of the State Constitution. The preliminary question of jurisdiction, however, interposed by counsel for Mr. Rogers, was considered at some length by the Chief Justice in his opinion. (Att'y-General ex rel. Werts v. Rogers et al., 28 Atlantic, 726.)

The state of facts presented to the court (without considering the political causes which produced them) was briefly, as follows: Twenty-one Senators of the State had divided themselves into two bodies. Nine of the old members, with one newly-elected member, who subsequently joined them, formed themselves into what was known as the "Adrain" Senate, while four of the old members, with seven newly-elected, comprised the "Rogers" Senate. The former had been recognized officially by the Governor, and at the time of the action remained in session. The "Rogers" Senate was recognized officially by the lower House, but not by the Executive, but it had passed various measures and had appointed certain State officers with the coöperation of the House of Assembly.

The applicants for the writ (the "Adrain" Senate) contended that the "Rogers" Senate had no legal existence inasmuch as it was organized in a manner contrary to the fundar of the State and the Constitution, "and, said the proposition, therefore, would seem very evident |

power is vested by the Constitution in this majority of Senators to construe such law in this respect, the power to expound and enforce it is lodged in the ordinary legal tribunals." (See Cooley, *Constitutional Limitations*, 46.) The counsel for the "Rogers" Senate, however, surprised the court by assuming the position that the interpretation of the Constitution "being a matter of purely legislative character," the court could not entertain jurisdiction of the case.

In reply to this the court said: "It is believed that no decision has been made for a century past that does not antagonize such a proposition."

The doubt expressed as to the court's jurisdiction certainly seems to have had no foundation whatever. The question was not whether the senatorial body had been organized in the accustomed mode or contrary to the custom prescribed by its own rules. Had that been the case it would have been proper for the settlement of the matter to have been arrived at by the senate itself without recourse to the courts. The court simply found itself called upon to determine whether or not the Constitution had been violated by the legislature and it has jurisdiction over such a question is clear.

The other points of the case fall, as we have said, within the particular provision of the New Jersey Constitution, and, although interesting in their bearing on the general subject present no doctrine of importance.

To readers of the daily newspapers the events which finally led to the application to the court are still fresh. The general concurrence and approval of the judgment that have been expressed form another instance of the willingness of the people of all parties to accept cheerfully a judicial decision, no matter how bitter may have been the contest.

THE CONSTITUTIONAL ASPECT OF THE HOUSE RULES.

There has been introduced into the House of Representatives at Washington a resolution amending Clause 1 of Rule VIII, of the Rules of the House. It has for its object the securing of a quorum on a yea and nay vote of the House when there is a quorum present. As is well known, for a

long time it has been the custom of the members of the minority desiring to block legislation, to refuse to vote on a call of the House, and thereby prevent the quorum of the members which is necessary to pass any measure. Mr. Reed, when he was Speaker, nullified this filibustering proceeding by counting as present, to aid in making the quorum not only those members who voted, but those who were present and refused to vote. The constitutionality of this proceeding was doubted, but all doubts relative thereto were set aside by the decision of the Supreme Court in the case of the *United States v. Ballin*, 144 U. S. 1. Mr. Justice BREWER, in his opinion in that case, said (p. 6): "The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers and their count as the sole test, or the count of the Speaker or the Clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the House may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question, and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the House is in a condition to transact business."

"As appears from the journal, at the time this bill passed the House there was present a majority, a quorum, and the House was authorized to transact any and all business. It was in a condition to act on the bill if it desired. The other branch of the question is, whether, a quorum being present, the bill received a sufficient number of votes, and here the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of

the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. As, for instance, in those states where the Constitution provides that a majority of all the members elected to either House shall be necessary for the passage of any bill. No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains."

The principle on which this decision rests is that the Constitution requires, and only requires the presence in the House of a majority of the members legally elected thereto in order that the House may transact business.

Any rule for ascertaining this fact—the presence of a majority of elected members—which is reasonably sure in practice of coming to a correct conclusion is constitutional. Once the fact of a quorum being present is ascertained, then anything which the majority of these members there present determine to do, the body, as an organization, does. The theory that, in order to pass a bill or do any other act as a representative body, a majority of the whole number of elected persons must unite in actively desiring the thing to be done; the theory, in other words, which required the majority party, which is responsible for legislation, to constantly keep a quorum of its own members in the House, however, it may be defended in the realm of politics or statesmanship, is entirely untenable in the realm of constitutional law.

The difficulty of obtaining a quorum in the present House of Representatives (without counting the quorum) after the manner of the last Congress above described, has been, we understand, very great. This, we presume, is the reason of the introduction into the House and the probable passage of the resolution above referred to, which, besides from its political aspect, raises a very nice question of constitutional law. The first and second sections of the resolution are as follows:

"1. Every member shall be present within the House during its sittings, unless excused or necessarily prevented, and shall vote on each question put unless he has a direct personal or pecuniary interest in the event of such question.

Whenever in pursuance of § 5, Art. 1 of the Constitution of the United States, the House of Representatives at the request of one-fifth of the members present shall order the yeas and nays of its members on any question to be entered on its journal, and upon a call of the roll of its members for that purpose a quorum thereof shall fail to vote, each member within the hall of the House who shall fail to vote when his name is called, unless he has a direct personal or pecuniary interest in the event of such question, and each member who shall be absent from the hall of the House when his name is called, unless he has been excused, or is necessarily prevented from being present, shall be fined the sum of \$10, and the Speaker shall cause an entry of such fine to be made against such member on the journal of the House, and the same shall be collected and paid into the Treasury of the United States."

Now, there can be no doubt that the House can provide rules for its own guidance and for the regulation of the conduct of its members. So far then, as the intended rule fines a member for being absent, there can be no constitutional objection to it; but, on the other hand, it is equally certain that each member of the House has a constitutional right to his vote on every question before the House, and that a resolution prohibiting any member from voting, or force any member to vote in a way different from that which they desired would violate, not only their own constitutional rights as representatives, but the constitutional rights of their constituency.

The question which is presented by the rule is this: has a member the constitutional right, being present, to abstain from voting? It might be argued that he has, for the reason that the passive act of abstaining from voting may more nearly obtain the desire of the representative in relation to the matter in dispute before the house. It may be, for instance, a perfectly logical position for one who desires the ultimate success of a measure, but thinks its consideration should be postponed until other and more pressing business was disposed of, to take this position: "If I vote against the measure, or for its postponement, I shall have, by increasing the majority for its postpone-

ment or rejection, a tendency to defeat the ultimate passage of this measure in which I am really interested. If I vote for either measure, on the other hand, I accomplish its immediate passage or consideration which will postpone other and more pressing business." In other words, it might be that, in relation to a question before a legislative body, a member thereof was not placed between the alternative of voting for or against the measure, but that he had three choices: to vote for it, to vote against it, or not to vote at all. If we are right in this, the curtailment and practical prohibition against exercising one of these choices, is unconstitutional.

Since writing the above, we understand that the proposed rule, whose constitutionality is here involved in a certain amount of doubt, has been withdrawn, and the Reed Rule substituted in its place. There seems to us to be no reason to doubt the wisdom of this course. As a political question, it may be proper that the majority should be required to keep a quorum present, they being responsible for legislation, but this principle is abandoned, as well by fining a person present ten dollars for not voting as by "counting the quorum." Around the latter method there can gather no constitutional doubts. The case we have here set out in full sets them at rest forever. But the constitutionality of the rule proposed is involved in a great deal of doubt. To fine a man ten dollars for not voting when he is present is practically to force him to vote "Yea" or "Nay" on the call of the House.

PROPERTY.

Eminent domain—Consequential damages.

The case of *Butchers' Ice and Coal Co. v. Philadelphia*, 156 Pa. 54, contains an important statement of the liability of a municipality for consequential damages to property under Art. xvi, § 8, of the Constitution of Pennsylvania. The plaintiff owned a wharf extending into the river, and the adjoining wharf owned by the city extended over one hundred feet farther into the stream than that of the plaintiff, between was a dock sixty feet wide into which the city opened

a sewer at a point on the inner side of the dock forty-seven feet from the plaintiff's wharf. It was in evidence that deposits from the sewer obstructed the dock, and that injury could have been avoided by the extension of the sewer to the end of the city's wharf. It was held that the city was liable for consequential damages and the liability was not affected the fact the sewer was on the city's land nor was essential that the land on which the sewer was constructed should have been taken by the city by right of eminent domain. The decision therefore did not turn upon the rule that the public right of navigation is paramount to the right of sewerage (*Franklin Wharf Co. v. Portland*, 67 Me. 46; S. C., 24 Amer. Rep. 1 and note), but simply upon the application of the familiar words, "taken, injured or destroyed," and therefore the case of *Malone v. The City*, 2 Pennypacker, 370, prior to the Constitution of 1874, could be distinguished. Another difference pointed out was that in *Malone v. The City*, "the sewer was built in obedience to a legislative mandate," while in the case in question the sewer was constructed by authority of an ordinance of councils under the Act of April 8, 1864. Aside, however, from these distinctions the decision indicates an intention to take a broader view of the clause of the Constitution in question and will no doubt lead to efforts to extend its reasoning to other and different kinds of damage resulting from municipal improvements.

Covenants running with land.

City real property owners in general and those engaged in the undertaking business in particular will be interested in the decision in *Rowland v. Miller*, in the New York Court of Appeals, 34 N. E. 765, affirming 18 N. Y. Supp. 793. The owner of lots in the residence part of the City of New York sold some of them under a covenant running with the land prohibiting their use for several purposes and concluding "nor shall any other buildings be erected, or trade, or business carried on upon said lots which shall be injurious or offensive to the neighboring inhabitants." Both parties occupied houses built on these lots, and an injunction was sought by the com-

plainant to restrain the defendant lessee of the house next door from carrying on the business of an undertaker upon the premises. "The parties," said the court, "had in mind ordinary normal people and meant to prohibit trades and business which would be offensive to people generally and would thus render the neighborhood to such people undesirable as a place of residence." It could not be doubted that the business of undertaking was within this definition. "Judges," said the court, "must be supposed to be acquainted with the ordinary sentiments, feelings and sensibilities of the people among whom they live," and hence, after the character of the business had been proved, the court "could have found as a matter of law that it was in violation of the restriction agreement." The contention, therefore, that the general clause in the covenant extended only to trades and kinds of business which are nuisances *per se*, could not be sustained. In view of the decision the decree is also interesting. It was ordered that the premises should not be used for holding autopsies, receiving, storing bodies, or holding funerals, but could be used to solicit orders and sell coffins by sample and the room called a "chapel" for a place of worship.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to William Draper Lewis, Esq., 726 Druxel Building, Philadelphia, Pa.]

THE BANKING QUESTION IN THE UNITED STATES, Report of the meeting held on January 12, 1893, under the auspices of the American Academy of Political and Social Science. Addresses by HORACE WHITE, MICHAEL D. HARTER, A. B. HEPBURN, J. H. WALKER, HENRY BACON and W. L. TRIMHOLM. Philadelphia: American Academy of Political and Social Science, 1894.

PROCEEDINGS OF THE NATIONAL CONFERENCE FOR GOOD CITY GOVERNMENT, held at Philadelphia, January 25 and 26, 1894, together with a Bibliography of Municipal Government and Reform and a Brief Statement Concerning the Objects and Methods of Municipal Reform Organizations in the United States. Philadelphia: Municipal League, 1894.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by T. E. and E. E. BALLARD. Vol. II, 1893. Crawfordsville, Ind.: The Ballard Publishing Co., 1893.

A TREATISE ON THE LAW OF PARTNERSHIP. By THEOPHILUS PARSONS, LL.D. Fourth Edition. Revised and enlarged. Boston: Little, Brown & Co., 1893.

A TREATISE ON THE LAW OF BUILDING AND BUILDINGS, especially referring to Building Contracts, Leases, Easements and Liens, containing also Various Forms Useful in Building Operations, a Glossary of Words and Terms commonly used by Builders and Artisans, and a Digest of the Leading Decisions on Building Contracts and Leases in the United States. By A. FARLETT LLOYD. Second Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY. By LEONARD A. JONES. Fourth Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, being a series of lectures delivered before Yale University. By JOHN F. DILLON, LL.D. Boston: Little, Brown & Co., 1894.

REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE. A treatise adapted to use in all the States and Territories where that system prevails. By JOHN NORTON POMEROY, LL.D. Third Edition. Edited by JOHN NORTON POMEROY, JR., A. M. Boston: Little, Brown & Co., 1894.

AMERICAN RAILROAD AND CORPORATION REPORTS, being a Collection of the Current Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago: E. B. Myers & Co., 1893.

CASES ON CONSTITUTIONAL LAW with Notes. Part I by JAMES BRADLEY THAYER, LL.D., Weld Professor of Law at Harvard University. Cambridge: Charles W. Sever, 1894. (Reviewed in this number.)

BOOK REVIEWS.

A TREATISE ON THE LAW OF QUASI CONTRACTS. By W. A. KEENER, Dean of the Law Faculty of Columbia College. New York: Baker, Voorhis & Co. 1893.

Professor KEENER has made a very valuable addition to the list of really scientific text books. The subject of which he treats is obscure, not so much from its inherent difficulties, but from the manner in which the subject has been treated from the earliest times by every court which administers the English system of law. Professor KEENER has endeavored to bring order out of chaos and has been most successful.

His first chapter dealing with the nature and scope of the obligation cannot but impress the reader at the outset with this idea. In all the cases he fails to find more than two opinions—one in Pennsylvania by LOWRIE, C. J., the other an English opinion by Mr. Lord Justice LINDLEY, in which the obligation of Quasi Contract is regarded as deriving its original from anything like the same source to which he himself attributes it. The accepted legal name for such obligations, contracts implied by law, he rejects, and not only rejects but proves to be utterly erroneous. All such so-called implied contracts and many which scarcely fall under that head he groups together within that class of obligation now recognized as those of Quasi Contracts, which, as he shows, differ from contracts in that the obligation is imposed by the law entirely regardless of that consent of the parties, which is the very vital principle and essence of the true contract and from torts, in that the obligation is positive, not negative; to do justice and right, not merely to refrain from wrong.

To bring the myriad of cases, all decided upon the fiction of a contract implied by law, often in the very teeth of the true state of affairs, within the broad and scientific principles which govern the true Quasi Contract is no light task, but Professor KEENER accomplishes it in a clear and convincing manner.

There is often, of course, the difficulty arising from the mode of thought pursued by the courts, often Professor KEENER'S principles are fully borne out by the decision of the cases but not by the reasoning upon which the decision is based.

It will excite surprise that the result of the cases decided upon so different a principle, a mere legal fiction, should coincide so nearly with the author's conclusions based upon a rational following out of the Quasi Contractual relation.

Naturally, in some of the cases difficulties arise, but in the main the book is not only an admirable treatise of what the law should be but also a clear exposition of what the law is, however bad the author may sometimes consider the foundation.

The book is an admirable specimen and product of modern legal thought, the tendency of which is to systematize and reconcile the conflicting and often fanciful theories of the ancient law upon a broad, scientific and rational basis, and it is impossible to doubt that it will have a great influence upon the mind of all those who may read it, and will serve to clarify the obscurities of a hitherto difficult subject.

The remaining chapters treat of the various separate divisions of the subject, as follows:

Chapter II. Recovery of money paid under mistake. III. Waiver of tort, which chapter is perhaps the best illustration of the author's methods. Nothing could be more logical, clear and convincing than the manner in which the law is stated, the cases in the main bear out his position, and yet but very few show any recognition of the underlying principles which he so clearly states. IV. Rights of a plaintiff in default under a contract. V. Obligations of a defendant in default under a contract. VI and VII. Recovery for benefits conferred. (VI.) By request in absence of contract. (VII.) Without request. VIII. Recovery for improvements made upon land without request. IX. Money paid to use of defendant. X. Money paid under compulsion of law. XI. Money paid to defendant under duress.

The form of the book is capital, the marginal headings are

most useful and the index is really a guide and not, as it too often is, a hindrance. The book is very well and clearly printed and should be read by all who are interested in the scientific development of the law.

F. H. B.

A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, adapted to the Laws of the various States with an Appendix of Forms. By ALEXANDER M. BURRILL. Sixth Edition, Revised and Enlarged, and an Appendix of State Statutes added by JAMES AVERY WEBB. New York: Baker, Voorhis & Co., 66 Nassau Street. 1894.

A new edition of this standard work is opportunely timed to supply a demand for information on a subject which at present must necessarily occupy the thought and attention of many attorneys. Mr. Burrill's work, originally published in 1853, has in the course of its six editions been through the hands of several editors, and in its present shape is a practical and satisfactory statement of the law on a subject which is necessarily complicated by the variety of statutes upon which it is based. The present editor, Mr. Webb, has removed from the text all quotations from state statutes, and has added as an appendix a synopsis of the statutes of the several states and territories relating to assignments for the benefit of creditors. While an attempt to paraphrase a statute is always to be deprecated, it may perhaps be justified in a text book on a subject involving a large amount of statutory law.

One of the most interesting chapters of the book relates to the subject of Preferences. The rule at common law was well established that a debtor in failing circumstances has a right in an assignment to prefer one creditor to another. The tendency of recent legislation, however, has been to restrict this privilege. Many of the older states have in recent years passed laws restricting it, and the new states, such as Oklahoma, North Dakota, South Dakota and others, have forbidden it. The subject of preference has given rise to litigation in many cases where there has been a conflict

between the laws of a state permitting preferences, and one which forbids them. A large portion of the chapter headed "The *lex loci* in its application to assignments," is given up to a discussion of this subject.

The general powers of the assignee are fully and clearly treated, but somewhat more might have been said on the question of the extent to which the assignee may conduct the business of the assignor.

While much new matter has been added to this edition the size of the book has been decreased by using smaller type and by increasing the size of the type page. It cannot be said, however, that the appearance of the page has been improved by the process.

ALBERT B. WEIMER.

SYPHILIS IN THE INNOCENT (Syphilis Insontium). Clinically and Historically Considered, with Plan for the Legal Control of the Disease. By D. DUNCAN BULKLEY, A.M., M.D. New York: Bailey & Fairchild. 1893.

The scope and character of this work are well stated in the following extracts from the introduction:

"Syphilis is not essentially a venereal disease. It has been too frequently regarded as being only such, and consequently some of its important features have been overlooked. Many able writers described well its clinical history, pathology and treatment, as also its connection with prostitution; but the element of its non-venereal character, in many instances, has been relatively little considered, and no full presentation of the subject has ever been made. In the present essay the attempt is made to consider only this single aspect of the malady, namely its innocent occurrence and the modes of infection whereby it is innocently acquired by means wholly unconnected with the venereal act."

"Clinical records, more or less complete, are given of one hundred and sixteen original personal cases of extra-genital chancres, a greater number than has ever before been reported by any observer in the United States."

"A table has been prepared exhibiting the location of over

9000 extra-genital chancres, which have been collected from the items given in the Analytical Bibliography."

"Another table, as complete as possible, gives the epidemics of syphilis which have occurred from the year 1577 to the present time; this contains data relating to over 100 epidemics, great and small, affecting over 3000 victims, in addition to the many instances where no definite statistics were given."

Not the least important chapter of this work is that entitled: "Prophylaxis—Hygiene and Medico-legal Considerations—Plan for the legal control of syphilis."

After showing from statistics the dangerous and far-reaching effects of this disease which counts its victims by thousands, more deaths being ultimately caused by syphilis than by small-pox, while the injury to health and interference with life-work are much greater in the former than in the latter, the conclusion is reached, which, as it seems to us, cannot successfully be contradicted, that syphilis should be placed, like other contagious diseases, under the control of the health authorities. The need of this seems certainly as urgent as in the case of consumption, which, we believe, has recently been made the subject of legal regulations in the State of Michigan. The author's argument upon this question seems to us most forcible and will repay a careful perusal. We should be in favor of proceeding even further than our author in this matter of restrictive regulation and make it a felony knowingly to transmit syphilis.

We commend the work to all who are interested in the subject of the public health as a valuable contribution to the literature upon this important subject.

MARSHALL D. EWELL, M. D.

The Kent Law School of Chicago.

PARLIAMENTARY TACTICS OR RULES OF DEBATE. Arranged by HARRY W. HOOT. New York: The Scientific Publishing Company.

This is a concise and handy little treatise which is so arranged that the chairman of any meeting holding the same in his

hands, could, by reading the side indices, place his hand at an instant on the rule which he desired to settle, and a question which came before him for decision. For instance, supposing a member of an assembly appeals from the decision of the chair. In an instant the chairman could turn to page 17 of this work and learn by a glance that any member may appeal from the decision of the chair; that the appeal must be seconded, that it cannot be amended and that it is not debatable, if the previous question is pending. This handy little book has been compiled from such authorities as ROBERTS, CUSHING, MATTHIAS, JEFFERSON and ROCKER.

So far as we have examined it, one placed in position of chairman, can safely rely on the rules given. W. D. L.

THE
AMERICAN LAW REGISTER
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REVIEW.

MAY, 1894.

A CITIZEN'S VIEW OF THE STATE OF AFFAIRS
IN SOUTH CAROLINA.

BY A CITIZEN OF SOUTH CAROLINA.

There has everywhere, and always, existed a feeling of disquiet among rural populations when thinking of and dealing with the people of towns and cities. The attrition of numbers gives a certain quickness and polish, acquired unconsciously, by the dwellers in towns, and the countryman, in spite of his good sense, often yields to envy and jealousy; forgetting that many of the ablest thinkers of the State are from the country. There can be no denial that this jealousy, however unworthy, has more or less force in all communities. Such feeling prevailed in a greater degree in Georgia and South Carolina than perhaps any other of the States. These States being very largely agricultural, were fruitful fields for its development.

The sea-coast of South Carolina, from commercial interests, was thrown into close communication with many foreign countries, and they sent their citizens as commercial agents to reside in Charleston. There were in that city many French, English, Spanish, German, Scotch and Irish merchants. Many of them were traveled and highly educated men. The influence of these men and of numbers of Charleston's citizens educated

in Europe had a beneficial influence on Charleston's people in their refinement and intelligence, though it provoked an exacerbation of rural feeling.

There was in South Carolina, in common with some other States, a mode of education that in late times has been much interfered with. It was due to the social nature of the people. It was the oral instruction received from friendly intercourse and at the table. Meals were not, as a habit, hurried through, but traditions of the family, of the acts of past and present local leaders, anecdotes of public men, were accompaniments often enjoyed by children and friends—for the table was for the whole family, young and old. It was to this custom, probably, that the intense pride of South Carolinians in their State was in great measure owing. They venerated its history and its heroes and they loved their State. It may seem a very small affair to insist on the value of sentiment to a community, but no Commonwealth can be properly governed or its people happy without the sentiment of home love and home pride.

During the late war, and for some ten or more years after, the schools in South Carolina were deficient in competent instruction to its youth. The poverty of the people, the breaking up of families and the hand to mouth mode of life caused by the upheaval of the so called "Reconstruction" made it difficult for the young men to become mentally well developed and to acquire trained, disciplined minds. The youth of those years are now at the front. They have the vigor and energy of manhood, and are called upon to take their part in public affairs. They are honest and well meaning. Many of them are readers and creditably informed, but unfortunately they have not been students. Their minds are not disciplined, and they do not understand the reasons of things, the fundamental principles that underlie knowledge. Such men are very useful, but are unsafe as leaders. They do not know how far to go. They speak well but do not always act well.

For several years past the farming population of the State has been unusually discontented. Although the farmers had

improved their impoverished condition since the war and the State was gradually getting a set of well to do citizens and farmers, the progress was not fast enough to suit the restless and ambitious. The speakers and leaders in the Alliances, earnest but not good business men, persuaded the farmers that they were imposed upon and robbed on all sides. They claimed that middlemen made fortunes out of the farmers, and this the honest and hard working, but two readily trusting farmers believed, as they were disheartened by the low prices for their crops, and their consequently lessened credit with the monied men. They were ready to run counter to all the laws of trade, in their eagerness to better their supposed lamentable condition. This restlessness and disquiet means something in South Carolina for the farmers as voters count, it is said, more than half of the State.

It will be perceived that lately there was in South Carolina that natural sense of uneasiness, or, if you prefer, of disdain, between the country people and the town people, and that the greater portion of the State, that part lying away from the sea-coast, was very sensitive in its estimate of its low country brethren. It is true that the up-country complained of the sea-coast's undue representation in the Legislature, but that is now adjusted and all sections are equal. It is to be noticed that State pride was very great and devotion to the State's interests was absorbing to all its citizens. We find also that while there were still many men of thorough education left in the State, there was, and is coming into view and action, a new set, who, while equally honest and true as those experienced men, now becoming aged and passing away, have not had the educational advantages and are not mentally so skilled as their predecessors. One should keep in mind also that the Alliance agitation, low prices and want of business tact have made a dissatisfied rural population. Understanding these things we can easily find how the present rule in South Carolina originated.

In the year 1890, a few men in the up-country met and determined they would attempt to make a new order of things in the State.

They issued a manifesto or address to the people. As a literary production it was not perhaps classic, but as a wire pulling device it was consummate. It was addressed to all of the conditions of the State and people which have been alluded to. These wire pullers represented no committee of any party or politics. They were self appointed and they called for a convention, which convention at its meeting "suggested" a candidate for Governor. The regular Democratic convention, which met afterwards, adopted the "suggestion" and nominated Tillman. Tillman was the inspiration of the whole matter. The wire pullers said he was the only man to carry out the policy of the manifesto. The regular Democrats had been so astonished at what had been done, not dreaming at first of the success of the policy, that they were inactive until too late. On the publishing of the address, for a while, there was a pause. The office seekers waited to see the strength of the new party, which called themselves Reformers. But when it was found that the farmers were carried away by the promise to them of low taxes and of having their rights, whatever they were, these time servers joined what was thought to be the stronger side, for the farmers as a class could poll more votes than all the other people of the State put together. The campaign commenced. The people were told that they had never had freedom. They had been living under an aristocracy, plutocracy, oligarchy, or some other terrible government. They, the people, and especially the farmers, had been deprived of office and their rights. The rich were the rulers. There was nothing to be proud of in the history of the State. A few families had been in possession of all authority for long years. Offices and places in the Legislature were held by lawyers and the chief citizens of the towns and cities. There was a corrupt ring governing the whole State. And it was insinuated that if Tillman and his friends should be elected, that foul dealings would be uncarthed and the State purified. Tillman was the organizer and leader of the campaign. With ability he possesses that indescribable power of so-called magnetism. Although a little rough, with occasional profanity in his language, he soon acquired immense influence with the peo-

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New jejeune men filled their places, and the farmers were jubilant at their showing in numbers never before reached.

During the canvass the prohibitionists obtained permission from the managers of election in the State to put at the polling places a box to test the prohibition strength in the State. It was not authoritative and many voters paid no attention to it. The votes did not, I believe, reach a fourth of the votes of the State, but a large majority was in favor of prohibition. No campaign whatever was made for or against prohibition, yet some enthusiasts in the Legislature claimed it was the duty of that body, on this informal vote, to take action. Some keen witted man, believed to be Tillman, saw the opportunity of making a revenue for the State and seized it. A *quasi* temperance plan was passed through the House, but in the Senate another plan or bill was substituted in the last days of the session, hurried back to the House, and passed. It was put in operation for six months, but found to be so defective that another bill was passed at the last session in December, 1893. These made what was called the Dispensary Law. The prohibitionists were perplexed. While there were some good things in the law, it did not prevent drinking. It only changed the mode and places of drinking. The corner shops were broken up, and men could not get a drink at will but had to take trouble to obtain spirits, and could not get them after 6 P. M., nor on Sunday. So far this was excellent. But no liquor could be sold in less quantities than one-half pint and only in bottles or jugs and could not be drunk at the dispensary. The consequence was that nien got drunk at home, and not in public bar-rooms, and often by having more than a drink in their bottles would take more than they intended.

The idea that the Dispensary Law was to promote temperance is a sham. The men who engineered it probably hoped and expected that it should be a money making business for the State, so that the promises of lower taxation should be carried out. They put such large profits on the sales that they have encouraged "blind tigers" to competition. Had a small percentage been charged, the "tigers" would have had

no inducement to run risks, and the expense for the insult for an army of spies would have been avoided. That profit was the chief object can be seen, from the fact that the larger the sales the greater the profits. In order to increase sales, the dispensaries were multiplied as fast as possible. Very little regard was paid to the general sentiment of a township or community. A petition with a certain proportion of signatures was only necessary for a dispensary, and everybody knows how easy it is to get signatures to a petition. There had been many places which local option law had made dry. Dispensaries were put in some of these places, to be followed by the spread to others; and spirits were brought to doors, from which they had before been miles away. The interest of the State was to sell and pocket the profits, and Tillman says he has the interests of the State at heart. In the liquor business he has shown it, buying the liquor himself, trying to put a State brand upon the packages, pushing the business and doubtless causing the law to be so framed as to make him chairman of the central board, the "front and offence" of the whole thing.

What has been the effect of this law upon the life of the citizens? In this respect good, that a few men are restrained. On the whole, bad. A law that holds out inducements to men to get round it is bad. It makes cheats and liars of good citizens. The people, especially the young, lose sense of truth and right. An old gentleman in a country district, who is eighty-six years of age, found the use at times of Hostetter's Bitters serviceable to him. He had none. His family asked a clerical friend in some town where it could be clandestinely had to send him a bottle. As Tillman's agents had the right to examine all freight and confiscate liquors, this bottle was sent by train done up as "Darby's Prophylactics." A clergyman and the family of an elder in the church thought their action, under the circumstances, right, and it was and is in the mind of any properly thinking person. Some clergyman hold that every time the communion is administered the law is violated. What are clergymen with

these ideas to do? Cider and medicine with a certain proportion of alcohol are prohibited.

No one in South Carolina could keep liquors of any kind in his house without having permission of the State. There are many persons who have had wine and spirits in their houses for years, maybe precious by inheritance. Nevertheless, such ones must get a certificate signed by the chief dispenser in Columbia, saying that such articles were bought for the parties own use. These certificates were sent the agents where there were dispensaries.

It may be asked how is such a law enforced, whence the power. The law is Tillman, it its inception and in its working, and for the advancement of Tillman. The case is taken as it existed before the late decision of the Supreme Court. He worked it, and to his suiting. Although Governor of the State, he bought the stuffs himself, the chief dispenser seeming only to obey his orders. He, under the law, organized a force of constables, some of them reputed to be unworthy men, whom we armed with pistols and Winchester rifles, and ordered from place to place, now Charleston, now Sumter, now elsewhere, to inspect and search railroad stations, steamers, the baggage of travelers; anything they suspected. When they scented game they broke open what baffled them, refusing to pay damages, though nothing contraband was found, and whether it was in a house, or in a depot, it was all the same to them. Even in Charleston people, with demijohns of artesian water, were stopped and the vessels were uncorked and smelled, in the public streets in broad daylight.

With any other man than Tillman as Governor such a condition of affairs could not last, if indeed it could under him. He is astute and knows how to gain his ends. He, under pretense that there was no correct list in Columbia of the notaries public, announced that all such commissions should expire at a certain time, and persons wishing to be notaries must apply to him. The fee from each notary was three dollars, and now they are all fresh, and well behaved, as their

commissions are at his pleasure. The dispensary system is a great political machine. Each county has its board of three, appointed by the central board in Columbia, of which Tillman is chairman, all removable by the board. Each county board appoints the county dispenser. The trial justices were informed that they must issue warrants to the constables or spies upon application. So Tillman is trial justice-in-chief on dispensary, and all other questions. Tillman's hand is felt everywhere and always. The Legislature, being composed of men elected with him, and through his campaign work, have hitherto done his bidding. He feels he has strong backing, and apparently it is so. Many begin now to think that his power is waning, and that his vindictive and arbitrary rule will pass. Force is his mode of action. When the spies first commenced their work in Charleston, there was obloquy and jeering given them. A collision between citizens and the constables was barely avoided. Instead of leaving the matter in charge of the mayor or sheriff, Tillman telegraphed to a military captain asking if his company could be relied on to obey orders. This threat of force was insulting to the municipal authorities, for no actual outbreak had occurred and the sentiment of the community was against violence. In Darlington the "spies," about a half dozen, none of them belonging to the place, were allowed to search the old drinking houses, but the citizens were determined that no private residences should be searched.

The search over, the "spies"¹ went to the railroad station. There two boys got into a street fight. The chief of police, who had come to the station, arrested them, and matters would have been quiet but for the meddling of one of the constables. He was pointed out to the chief as having interfered in the fight, taking sides. He made an improper remark about the informer, who, thereupon gave him back the lie. The constable at once fired on the man who was seated and

¹ The word "spies" is commonly used by the people in Carolina toward this class of constables and is employed here to illustrate the feeling toward them.

had shown no weapon, and killed him. The very few citizens who were armed prepared for defence. There were not more than twenty citizens in all at the station, and they retreated before the more than dozen well armed "spies," and in turn the constables, expecting the people of Darlington, a mile distant, to come in numbers to avenge the death of its two slaughtered citizens, hastened to get away and took to the woods. Tillman says he had a request for troops, but has never definitely said who the parties making the request were, and he ordered troops from Charleston and Columbia. These companies refused to be made parties to such proceedings, for they knew as much as Tillman did about the situation and thought the Darlingtonians should be left to their own civil officers, who declared they could keep the peace. Tillman made a party issue, declaring that the conduct of Darlington and the militia was opposition to him. He worked very hard and aroused his up-country adherents to the belief that he was the victim of conspiracy. Force was his object and he obtained it. Implicit obedience was demanded as the duty of the soldier. In this country, a nation of "sovereigns," it is the pride of the people that they are to think for themselves.

In his letter of May 1, 1894, to Capt. Phelps, of the Sumter Militia Company, Gov. Tillman, in speaking of disobedience of soldiers to orders of the Commander-in-chief, says: "And no citizen-soldier can ever question his commands till they are of such an outrageous kind as to override law, decency and justice." Why should not the citizen-soldiers of Charleston, Columbia and elsewhere be as good judges of "law, decency and justice" as Gov. Tillman? Some of them were veterans of the late war, and knew more of military life and matters than did Tillman, who never saw service. They exercised the right that, as citizens, even Tillman accords them. Whether it was prudent or not time will tell.

"The law gives the constables, when armed with proper warrants from the civil authorities, the right to search private residences for the seizure of contraband liquor." These "proper warrants" can be taken out on "information and belief." The trial justices have been instructed to allow no

delay when applied to. The "spies" a number of times had entered and searched with these "proper warrants" houses where nothing contraband was found. As the warrants were easily obtained, and had often failed of results, the public came to believe that under the spy system "information and belief" meant nothing more than suspicion, and that malice helped that suspicion. Under the impression that no one's house was safe, can it be wondered at that self-respecting citizens should chafe under such a tyranny!

Gov. Tillman has published, in the May number of the *North American Review*, an article which he calls "Our Whiskey Rebellion." This shall help us to portray our view of affairs in South Carolina since his administration. He says: "In the fall of 1892, the General Assembly passed the Dispensary Act as a compromise between the wishes of the ultra-prohibitionists and the whiskey people." One would infer from this that the people of the State had discussed prohibition and laws for or against it. The Dispensary Act, or the thought of it, was never before the people for their voice or vote. In the approaching summer the people, for the first time, will have full opportunity of using their voices and votes for or against the Dispensary Law or a like law. The whole matter was a job in the Legislature for revenue, hurried through at the end of the session of 1892 and repaired at the next session of 1893.

To what has been before said of the profits made by the advanced prices on the sales of whiskey, it may be added that the law was so framed that the proportion of profits due the towns and cities where there was a police, could be sequestered by the State Board of Control in Columbia, of which Tillman was chairman, and turned over to the State, on the pretext that the local police did not properly enforce the law, the board being sole judge and jury. The board did sequester, and surely it was for revenue to the State.

Besides the unrest under the Dispensary Law, there was feeling against Tillman among the best-informed men of the State. Let Tillman speak. The "old Bourbon element," (whatever that may mean, though it sounds well applied to

people you do not like). "The old Bourbon element had control of the press and the banks. Among them were the best trained intellects of the State, and these all kept warring upon the new order of things," which new order of things was Tillmanism. How strange that the ability and best-trained minds of the State should war on Tillmanism! There must be reason for it. The banks and finances, intricate subjects, very little understood and often misrepresented, had been heavily used by Tillman and his friends to batter Bourbonism. Tillman has disturbed and disrupted all the old lines of politics with the masses of the people. He gives a new nomenclature to parties or the factions from the old parties. It is now "Tillman" and "anti-Tillman," as he says in his "Rebellion." "Every daily paper in the State, save one, is under control of the 'antis,' as they are called." Herein again he admits that a large force of intellect is opposed to him, since the daily press usually employs the very best intellects. Tillman was elected when the vote of the State was not a very large one. He did get a large majority of those taken, but the vote seems to have been by classes. Hear him again: "I was elected by an overwhelming majority, the greater part of my support coming from the agricultural classes, which had until then been practically deprived of a voice in the selection of the officers of the State Government." This sad deprivation of the selection of officers appears very odd in view of the fact that the farmers constitute the majority of the voters of the State.

The Governor, speaking of these constables at Darlington, says: "They had no intention of searching any residences." He declares this after his "Rebellion." But not one word of this kind could be had from him before it; he would give no assurance of security, though he knew all the people of the State were in a ferment lest their homes should be invaded. He knew the legality of the Dispensary Law was before the Supreme Court, and would be soon decided. He could not, however, be patient and wait the issue. His nature is to override opposition, and he involved the whole State in the risk of bloodshed, where already too much had been spilled through

the agencies of his administration. He accuses the people of Darlington of a conspiracy: "The leaders of the conspirators spread abroad reports that the constables were there for the purpose of searching private houses without warrants." The people of Darlington, doubtless, held the same view with their fellow-citizens elsewhere, that these "proper warrants" were to be taken on "suspicion." There was excitement, as was to be expected under the circumstances. But the constables made their searches without harm, except a little abuse to be naturally expected, and they were joined by eighteen others by order of Tillman. Thus twenty-three men, heavily armed with Winchester rifles and pistols, in a time of peace, were sent into a community which would have, doubtless, been at peace and quiet but for their presence. Supposing the population of Darlington to be 2300—a large estimate—there was a constable to every 100 of its inhabitants, men, women and children, in that small town. Let us make the calculation for a place of greater size—say, for Philadelphia—which has a larger population, but which, for easy counting, we will limit to 1,000,000. This would give 10,000 men. What would the people of that city say or do if the Governor of Pennsylvania were to send to Philadelphia a force of 10,000 well armed men, strangers to the city, to enforce the liquor laws, and that dram houses and private residences were to be treated alike. More than this, beside the twenty-three constables, a company of forty-two militia, also armed, were ordered to Darlington at the same time with these twenty-three. That there was no necessity for all this, hear what Captain Phelps, of the militia company, says: "Arriving at Darlington, I immediately reported to the sheriff, who stated to me that he was not aware that we had been ordered to Darlington, and that he had not requested the aid of the military, and that he had no instructions from Governor Tillman in reference to my company." Again, he reports to the Governor: "From all I could hear, and from personal investigation and observation. . . . I have reported to sheriff. Everything quiet. See no reason for keeping us

here. Sheriff says he has no orders for our command." This was before the killing in Darlington; and even after it, it does not appear that the peace and order of the place was beyond the control of the civil authorities. It is true they had sent out civil posses, larger than usual, after the constables engaged in the killing, for it was known that they were reckless men and well armed, and a bloody fight was expected. The spies escaped, but the excitement throughout the State was intense as soon as Tillman ordered out the militia in force and seized the telegraph lines and the railroads. There would probably have been good order but for Tillman's rashness. Some believe that Tillman had long designed and was watching for an opportunity for a military coup.

The excitement was great throughout the State, but it was particularly so in Columbia and the two counties of Darlington and Sumter. The Governor, after he had called out troops, kept in Columbia a force of three hundred men, "mostly volunteers, who had taken their horses from the plough and shouldering their shot-guns, hastened to sustain the government of their choice." Infatuated Governor! the choice of the farmers, whom he uses, honest but too credulous, to control the citizens of a town and the capital of the State.

Very many of the people of the towns and cities were dissatisfied with Tillman and the Dispensary Law, thrust upon them by a "coup." The two go together. The law was considered to be arbitrary and unconstitutional. It was supposed to be enacted for revenue. It gave too much patronage to the Governor, for, as Chairman of the State Board of Control, he ruled its many agents throughout the State. It created a new order of constables, appointed and removed by the Governor at his will. The people were restive under the meddling authority of Tillman. They felt him in everything. He did break up one political ring, but rings, under our system, must always be, and Tillman soon established a worse ring in himself. Except in a few places beyond his control, it is said no man can obtain a State office without

his consent. Every trial justice must obey his will or lose his place. The Governor kept armed men going from place to place in time of peace. The alumni and friends of the schools and colleges were and are afraid of his interfering with them to their injury. Tillmanism has already greatly damaged the State University. The towns and cities were made to feel his hostility, which was so bitter as to be unconcealed and which threatens them always. The people's business has suffered, real estate is depressed, and the politics of the past and present drives capital, so sensitive, to other marts. Vine culture and the manufacture of light wines, growing industries of the State, have been checked, perhaps destroyed. The citizen, accustomed to pleasant beverages, had little choice, but was obliged to take what the dispensary offered, good, bad or indifferent. He has divided the State into factions, the factions being classes. He has excited the jealousies of the rural and town people. These are some of the causes that disturb the ill-governed State of South Carolina.

Tillman's "Rebellion" shows with how slight a sense of propriety he rules, and exposes his plan, if needs be, to rule and subdue to his will the people. He openly proclaims: "Had I deemed it necessary I could, in forty-eight hours, after issuance of the call, have had an armed force of ten thousand farmers at my command." What an admission to make for an honest, brave, intelligent ruler, who should have at heart the welfare of all classes. And it is the farmers again. The merchants, professional men, capitalists, mechanics, bankers, railroad men and all the like weigh little with Tillman.

Force has been used, and it looks as if it is intended to be used by Tillman when it suits him. The new military companies, now forming at Tillman's suggestion, already approach one hundred in number. They are chiefly formed in the country districts, and are partly armed with weapons taken from the town companies. What does it mean? Is he preparing for the election campaign in the summer, when a new Legislature is to be chosen? The new Legislature is to elect a United States Senator, an office to which Tillman aspires. He is to stump the State against the present

incumbent, Senator Butler, and the contest is expected to be a very bitter one. What is the use and purpose of this unusual and rapid organization of militia?

Mr. McLaurin, a Tillmanite, and Congressman from South Carolina, says of Tillman's genius that it is "essentially destructive." The *Aiken Journal Review* comments thus on the remark: "Tillman has destroyed good feeling between the people of the State, he has destroyed confidence in the State, he has about destroyed the State altogether." If Tillman could be dropped out of sight and hearing, South Carolina, in a few months, would again be peaceful happy and prosperous.

LIQUOR LEGISLATION IN SOUTH CAROLINA.

By JOHN H. INGHAM, Esq.

On December 24, 1892, the General Assembly of South Carolina passed an "Act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this State except as herein provided." This act provides for the appointment by the Governor of a commissioner who shall purchase all intoxicating liquors for sale in the State and furnish them to County Dispensers, after they have been tested and declared to be pure and unadulterated. He shall not receive from the Dispensers more than fifty per cent. above the net cost, and this amount is to be paid to the State Treasurer every month, and on this fund he is to draw for all necessary expenses, and in all his actions he is to be subject to the rules and orders of a State Board of Control, composed of the Governor, the Comptroller-General and the Attorney-General. Before entering upon his duties he is to execute a bond to the State Treasurer in the penal sum of \$10,000 for the faithful performance of such

duties. The County Dispensers are to be appointed by County Boards of Control (appointed by the State Board of Control), but permits are not to be issued to them before they file petitions signed by a majority of the freehold voters of the town or city in which the permit is to be used, requesting the same and certifying to the character and sobriety of the petitioner, and they are to enter into bonds in the penal sum of \$3,000 for the faithful performance of their duties. These duties are, among others, to sell intoxicating liquors only at the place designated in the permit, and at a charge not exceeding fifty per cent. above the net cost; not to furnish them to any person unknown to the Dispenser personally, or not duly identified, nor to any minor, intoxicated person or persons addicted to intoxication; to make accurate returns every month to the County Board of Control of all certificates and requests, and of all sales made during the month; to keep strict accounts of all liquors received from the State Commissioner, and to pay all profits, after paying the expenses of the County Dispensary, one-half to the County Treasury and one-half to the municipal corporation in which the Dispensary is located. Provision is made for the selling of liquors for medicinal purposes to licensed druggists at a net profit of not over ten per cent., and the sum of \$50,000 is appropriated to the purchase of liquors that are to be distributed to the County Dispensers. Penalties are imposed for keeping liquor at clubs and all places where it is sold in violation of the Act are declared common nuisances and are to be searched, closed and abated. After July 1, 1893, no person shall manufacture or sell intoxicating liquors for any purpose whatsoever, otherwise than is provided in the Act, and licenses already authorized to be granted shall be in force only until July 1, 1893. The section of the Act relating to requests for purchase I quote in full: "Sec. 11. Before selling or delivering any intoxicating liquors to any person a request must be presented to the County Dispenser printed or written in ink, dated of the true date, stating the age and residence of the signer for whom and for whose use the liquor is required, the quantity and kind requested, and his or her true name and residence, and, where

numbered, by street and number, if in a city, and the request shall be signed by the applicant in his own true name and signature, attested by the County Dispenser or his clerk who receives and files the request, in his own true name and signature, and in his own handwriting. But the request shall be refused if the County Dispenser filling it personally knows the applicant applying is a minor, that he is intoxicated, or that he is in the habit of using intoxicated liquors to an excess; or if the applicant is not so personally known to said County Dispenser before filling said order or delivering said liquor, he shall require identification, and the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor, and is not in the habit of using intoxicating liquors to excess."

These requests are to be made on blanks furnished to the Dispenser by the County Auditor. The Dispenser is to preserve the applications and return them to the Auditor who is to file and preserve them, to be used in the quarterly settlements between the County Dispenser and County Treasurer. The scenes of riot and bloodshed that followed the attempt to put this law (thereby proved to be an unpopular one), into execution are fresh within the memory of all and it is unnecessary to do more than allude to them. The validity of the Act was brought into question in the cases of *McCullough v. Evans*, *State v. Jacobs*, etc. (heard together), and the Supreme Court decided (Pope, A. J., dissenting) against its constitutionality, except in so far as it forbade the granting of licenses to retail spirituous liquors beyond June 30, 1893. The grounds of the decision were: 1. The traffic in intoxicating liquors not being in itself unlawful or immoral, but such liquor being, on the contrary, a lawful subject of commerce, an Act forbidding anyone in the State from engaging in such traffic conflicts with the rights of personal liberty, and private property secured by the Constitution, unless it is a legitimate exercise of the police power of the Government. "Before, therefore, the sale of intoxicating liquors can be declared unlawful, there must be some valid statute declaring it to be so; and we must say that we have been unable to find any such statute on the statute

books of the State. . . . It does not seem to us possible to regard the Dispensary Act as a law prohibiting the sale of intoxicating liquors. On the contrary it not only permits but absolutely encourages such sale to an unlimited extent; for, by its profit feature, it holds out an inducement to every taxpayer to encourage as large sales as possible and thereby lessen the burdens of taxation to the extent of the profits realized. If the Act, instead of confining the privilege of selling liquor to the State, had undertaken to confer such exclusive privilege upon one or more individuals, or upon a particular corporation, could there be any doubt that such an exercise of legislative power would be unconstitutional? We can see no difference in principle between the two cases." In other words, the court seems to be led into the curious statement that, while an Act declaring a lawful trade unlawful for all purposes is perfectly valid, an Act restricting that trade is invalid simply for the want of such a declaration.

2. The Act is not a legitimate exercise of the police power *regulating* the sale of intoxicating liquors as it *forbids* the sale by all private persons, and if it be said that the sales by government officials are *regulated* by the Act, still "the police power can only be resorted to for the government and control of the people of the State and cannot with any propriety be appealed to for the purpose of controlling the action of the State itself. . . . The exertion of the police power, especially where it abridges or destroys the constitutional right of the citizen, can only be vindicated as a measure of self defence. . . . or . . . by some overruling necessity. If the various restrictions and regulations as to the sale of intoxicating liquors by the officers and agents of the State be designed only for the protection of the public health or the public morals, and are fit and appropriate to that end, we do not see why such restrictions and regulations could not be applied to the sale of such liquors by private individuals, and, if so, there was no necessity for any such sweeping act, whereby the constitutional rights of the citizen, hereinbefore referred to, have been absolutely destroyed, but these rights should be reserved to the citizen and only restricted by such regulations as

may be necessary for the public good. But in addition to this we are compelled to say, without in the slightest degree intending to impeach the motives or to criticise the intentions of the members of the Legislature by which this Act was passed, and, on the contrary, freely according to them the best motives and the purest intentions, that, judging the Act from the terms employed in it (the only way in which a court is at liberty to form an opinion), it cannot be justly regarded as a police regulation, but simply as an Act to increase the revenue of the State and its subordinate governmental agencies. This is apparent from the profit features of the Act, from the various stringent provisions designed to compel consumers of intoxicating liquors to obtain them from the officers and agents of the State, and notably by the provision authorizing the State Commissioner to sell such liquors to persons outside of the limits of the State, which certainly cannot be regarded as bearing the faintest resemblance to a police regulation for the purpose of protecting the public health or the public morals of the people of this State. But it is earnestly contended by the Attorney-General that if the power to prohibit absolutely the sale of intoxicating liquors be conceded, it follows necessarily that the State may assume the monopoly of such a trade, and in support of this view he cites Tiedeman on the Limitations of the Police Power, 318, where that author uses the following language: 'There is no doubt that a trade or occupation which is inherently and necessarily injurious to society may be prohibited altogether; and it does not seem to be questioned that the prosecution of such a business may be assumed by the government and managed by it as a monopoly.' But the only authority which the author cites to sustain this rather extraordinary proposition is the case of *State v. Brennen's Liquors*, 25 Conn. 278, overlooking entirely the case of *Beebe v. State*, 6 Ind. 501, which holds an opposite view and which had previously been cited by the same author at page 197 and quoted from, apparently, with approval. But in addition to this we are unable to perceive how the right to prohibit a given traffic carries with it the power in the State to assume the monopoly of such traffic. If the right to prohibit the sale

Intoxicating liquors rests upon the ground that such a business 'is inherently and necessarily injurious to society,' as is involved in the statement by the author of this proposition, and it seems to us that the logical and necessary consequence would be that the State could *not* engage in such traffic, for otherwise, we should be compelled to admit the absurd proposition that a State government, established for the very purpose of protecting society, could lawfully engage in a business which 'is inherently and necessarily injurious to society.' We must prefer then to follow the case of *Beebe v. State*, rather than *State v. Brennen's Liquors*." The court cites the case of *Rippe v. Becker* (Minn.), 57 N. W. Rep. 331, which I shall refer to later.

3. The Legislature have no authority to embark the State in trading enterprise; not because there is any *express* prohibition, but because it is utterly at variance with the very idea of civil government. The conferring of legislative power in the Constitution does not involve "the unlimited power of legislating upon any subject or for any purpose according to unrestricted will, but must be construed as limited to such legislation as may be necessary or appropriate to the real and only purpose for which the Constitution was adopted, to wit: the formation of a civil government . . . It is expressly declared that 'The enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.' . . . It seems to us that the true construction of this clause is that, while there are many rights which are expressly reserved to the people with which the Legislature are forbidden to interfere, there are other rights reserved to the people, not expressly, but by necessary implication, which are beyond the reach of the legislative power, unless such power has been expressly delegated to the legislative department of the government. . . . It seems to us clear that any Act of the Legislature which is designed to or has the effect of embarking the State in any trade, which involves the purchase and sale of any article of commerce for profit is outside of and altogether beyond the legislative power conferred upon the

General Assembly by the Constitution, even though there may be no express provision in the Constitution forbidding such an exercise of legislative power. Trade is not and cannot properly be regarded as one of the functions of government. On the contrary its function is to protect the citizen in the exercise of any lawful employment, the right to which is guaranteed to the citizen by the terms of the Constitution, and certainly has never been delegated to any department of the government."

Pope, A. J., dissented for the following reasons. 1. The legislative power is absolutely unlimited, except so far as restricted by the Federal and State Constitutions. The Dispensary Act is no infringement on rights of life, liberty or property. "It is unjust to the Act in question to ascribe to it as its leading and controlling feature the raising of a revenue for the State and its municipalities. The proper construction is that in the exercise of the State's undoubted police power in order to promote sobriety, preserve the health and provide for the safety of her citizens, the State has passed this law prohibiting the sale of spirituous liquors by private persons, but, recognizing the demand for pure, unadulterated liquors, she has created a governmental agency under strict regulations to sell those liquors with enough profit thereon to pay the expenses of the purchase of these liquors, the expenses of conducting the business and to police the State to prevent infractions of her laws in this Act provided." The entire right to control and regulate the liquor traffic has been held in innumerable decisions to belong to the Legislature in the exercise of its police power. 2. The Legislature has the power of conferring exclusive rights on municipal corporations and on the State itself, *a fortiori* where, as here, there are no inherent rights of others to be considered,—the right to manufacture and sell liquor, not being an inalienable one of a citizen as such, according to numerous Federal and State decisions. "No one is wronged when he is only excluded from that in which he never had a right. . . . Very ingeniously, it is suggested, how can the State regulate itself? This is specious and unsound. The people are the State. The government is their agency. Does not the State run the

health department, furnishing the plant necessary to conduct that beneficent work and pay all its expenses, under a system of regulation? So, too, the State Penitentiary, the Lunatic Asylum, the Deaf and Dumb Institute? Look at the Post Office of the General Government. Then it is again suggested, this is a monopoly created by the State. As to this matter it may be suggested that such a term of monopoly as applied to a sovereign State is a misnomer. Monopolies at the common law and against which all Englishmen protested, were grants to individual citizens. Here the State operates the business for the benefit of all her citizens. The people are the State; the government is their agent and any benefits under the Act are enjoyed by the whole people." Without attempting to treat the elementary principles of Constitutional Law that are discussed at great length in both opinions, it may be said that it has been decided over and over again that the whole matter of the control and regulation of the liquor traffic is one that belongs to the Legislatures of the different States by virtue of their police power and that, when they see fit, they may totally prohibit the manufacture and sale of liquor within the borders of their respective States: See *The License Cases*, 5 How. 504; *Gilman v. Philadelphia*, 3 Wall. 713; *Bartemeyer v. Iowa*, 18 Wall. 129; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Crowley v. Christensen*, 137 U. S. 86; *Reynolds v. Geary*, 26 Conn. 179; *Com. v. Kendall*, 12 Cush. (Mass.) 414; *Com. v. Gague*, 153 Mass. 205; *Jones v. Peo.*, 14 Ill. 196; *Pierce v. State*, 13 N. H. 536; *Preston v. Drew*, 33 Me. 558; *Paul v. Gloucester Co.*, 50 N. J. L. 585; *Trageser v. Gray*, 73 Md. 250; *Lincoln v. Smith*, 27 Vt. 328.

There is no inherent right of personal liberty or private property which such laws infringe on. In *Crowley v. Christensen*, 137 U. S. 86, 91, the court say: "The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with

danger to the community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in the discretion of the governing authority."

So in *Mugler v. Kansas*, 123 U. S. 623, 660, it is said: "But by whom or by what authority is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions so as to bind all must exist somewhere; else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only, they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exercise what are known as the police powers of the State and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health or the public safety. . . . It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. . . . If . . . a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution. . . . There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil."

In *Trageser v. Gray*, 73 Md. 250, 253, the court say: "No one can claim as a right the power to sell either at any

time or at any place, or in any quantity. If he is allowed to sell under any circumstances, it is simply by the free permission of the Legislature, and on such terms as it sees fit to impose. . . . It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticise its conclusion. We do not think that this law is, in any manner, in conflict with the Constitution of this State. We regard it as included 'in that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General Government.'"

On the same principle, though somewhat extended, it was held in *Powell v. Pennsylvania*, 127 U. S. 678, that a State law prohibiting the manufacture and sale of oleomargarine was a lawful exercise of the police power. The court says, on p. 685: "Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. . . . If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

It is difficult to see in the South Carolina Act anything more than a plan (though a severe and, perhaps, unwise one) of the Legislature to regulate the liquor trade so as to promote public health and sobriety. Though there is a possibility of

the State's more than covering its expenses, and thereby making some profit, the main purpose of the revenue provisions would appear to be, as the dissenting judge said, "to pay the expenses of the purchases of these liquors, the expenses of conducting the business and to police the State to prevent infractions of her laws." The principal question in the case is, therefore, whether the Legislature in the exercise of its police power may grant exclusive privileges to the State itself as against the citizens. With regard to the power of the State to grant monopolies, it is said in Tiedeman, *Limns. of Pol. Power*, 326: "There is always this limitation to be recognized upon the power to make a monopoly of any trade to be conducted by itself, or by some private individual or corporation to whom it is granted as a privilege, viz.: that the general prosecution of the trade or occupation by everyone who chooses to engage in it, produces injurious results which can only be avoided by making a monopoly of the trade." That the extent to which the liquor traffic produces "injurious results" is a question for the Legislature to decide, is conclusively settled by the cases cited above. It is also certain that the State may grant to municipal corporations exclusive rights to carry on injurious trades. In the *Slaughter-house Cases*, 16 Wall. 36, it was held that an Act forbidding anyone but a particular corporation from carrying on the business of running a slaughter-house was valid. The court said: "If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation, and on the public, would have been the same as it is now. Why cannot the Legislature confer the same power on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing?" In the same way, the exclusive right to supply water or gas-light, or to lay railway tracks in the streets may be given. The "obligation to serve the public impartially would seem to be an essential incident to any grant of a monopoly,

since without it it would be impossible to justify the grant on public grounds:" Cooley, Constl. Law, 247.

In *State v. Brennan's Liquors*, 25 Conn. 278, cited in the opinion of the court, it was held that the provisions in an Act with regard to the exclusive sale of liquors by the towns through agents appointed for that purpose, are not invalid as giving to the towns a monopoly of such sale. The court say: "The object of the Legislature in authorizing a sale by a public agent for certain purposes was not to raise a revenue for the town but to accommodate certain persons with spirits for particular uses, and at the same time to guard against the evils resulting from an indiscriminate sale by all persons and for all purposes." But in *Beebe v. State*, 6 Ind. 501, a case which the South Carolina court preferred to follow, similar provisions were held unconstitutional. This decision was, however, a mere corollary to the main one in the case which went so far as to assert that all prohibitory statutes were unconstitutional and is opposed to nearly all the cases on the subject, both State and Federal. The Indiana case is, therefore, not entitled to the weight given to it in the opinion in the *Dispensary* case, especially as in a later case in the same State it is said: "It is undoubtedly true that the common law does not recognize any difference between intoxicating liquors as property and any other species of property. But while it is true that intoxicating liquor is property, still its inherent character is such that it is the proper subject of the police power. . . . Acting upon the just assumption that the unrestricted sale of intoxicating liquors results in much evil and that it is detrimental to society, the law-making power of each State in the Union has, in the exercise of its police power, assumed to control, regulate or prohibit the business, as seemed to it best. The extent to which such power shall be exercised must, of necessity, be left to the law-making power of the State exercising such right:" *Welsh v. State*, 126 Ind. 71, 77. This certainly seems to impugn the authority of the earlier case. In *Rippe v. Becker* (Minn.), 57 N. W. Rep. 331, cited with approval in the opinion in the principal case, it was held that an Act to provide for the

erection of a State elevator or warehouse in a city for public storage of grain, was not an exercise of the police power to regulate the business of receiving, weighing and inspecting grain in elevators, "the evident sole purpose of the Act," the court said, being "to provide for the State erecting an elevator and itself going into the 'grain elevator' business. . . . The police power of the State to regulate a business does not include the power to engage in carrying it on." This broad statement, though applicable to a case where a State interferes with rights of citizens to engage in ordinary business and embarks in a trade for purposes of profit, can hardly be extended to a case like the present where the citizen has no "inherent right" to practice the trade unmolested by the Legislature, but where, on the contrary, that very trade is universally recognized as one that falls peculiarly within the scope of the police power. It is hard to see why the Legislature, possessing all powers not denied them by the Constitution and among others that of conferring exclusive franchises on individuals and corporations, private and municipal, in matters of a public character, should be debarred, without some express prohibition in the Constitution, from conferring similar franchises on the State itself. In other words, it should be for the Legislature itself, in a case like the present, to determine whether the business is "so far public and essential to the general welfare that it cannot properly be thrown open to all and should therefore be conducted by the government directly or through agencies which it constitutes and can control;" Hare, *Am. Constl. Law*, 784.

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ALTON V. FIRST NATIONAL BANK.¹ SUPREME JUDICIAL COURT
OF MASSACHUSETTS, OCTOBER 22, 1892.

Plaintiff endorsed certain papers supposing them negotiable notes, afterwards the principal fled and the plaintiff was called upon for payment. After paying a portion of the notes plaintiff was advised that they were not negotiable and refused further payment. A suit by the bank to recover the remaining amount was decided in his favor. He then brought this action to recover the amount paid to the bank. Held, the mistake under which the payment was made would not warrant a recovery, it being a matter equally open to the inquiry of both parties.

¹ Reported in 32 N. E. Rep. 228; 157 Mass. 341.

MONEY PAID BY MISTAKE OF LAW.

The subject of mistake of law is involved in confusion and the decisions of the courts give little hope of the speedy adoption of a general rule or a decisive victory for either of the views that have moulded the decisions of judges and chancellors. The question is one that lies so close to the border-land of morals that it is more than difficult to decide whether the victim of circumstances shall be assisted and relieved or allowed to suffer for his stupidity. It was argued before Lord Mansfield that all the laws of the country are presumed clear, evident and certain. But the Chief Justice replied, "as to the certainty of the law it would be very hard upon the profession if the law was so certain that everybody knew it. The misfortune is that it is so uncertain that it costs much money to know what it is even to the last resort:" *Jones v. Randall*, Cowp. 37. Whatever may have been the

view formerly there can be no doubt that at present the granting of relief in cases of mistake of law rests in the discretion of the court, a discretion that must be exercised with the greatest care, but the existence of which it is now too late to deny: *Griswold v. Hazard*, 141 U. S. 260.

While this may be true in equity, it is, nevertheless, almost unanimously laid down by text-writers that money paid by mistake of law cannot be recovered back, and the statement is made without qualification. Indeed, the payment of money by mistake of law is usually regarded as the last, impregnable stronghold of the maxim, *ignorantia juris non excusat*.

The subject was complicated at an early date through the conflicting propositions of the Roman law. In the Code it is stated that where a person ignorant of the law pays money which is not due, the right to repetition ceases, for repetition is only allowed in those cases where what is not due is paid in consequence of an error of fact: Dig. xx, tit. 29; Code Lib. 1, tit. 18, l. 10; Inst. Lib. III, tit. xxvii, §§ 6 and 7. Upon the texts a hotly contested battle has been fought by the commentators; Cujas, Donnellus, Voet, Heinneicus, Pothier and Savigny contend that no action lies, while the contrary is maintained by Vinnius, Huber, Ulric and D'Aguesseau. Voet Lib. 12, tit. 6; Savigny System, 8, 3; Evans' Pothier on Obligations, Appendix 320; Vinnius Inst. Lib. 3, tit. xxviii 6; Domat Lib. 1, tit. 18, § 1. The former writers rely upon the words of the Code and the positive laws of the Emperors Diocletian and Maximian, while the latter contend that the right of action can only be excluded by exceptions founded upon equity upon the opposite side. In the words of Vinnius "the mere circumstances of my having mistaken the law does not alone give you a just reason for retaining what was not in any manner due to you, and in this case, *melius est favere repetitioni quam adventu lucro*." The Civil Code of France adopted the views of Vinnius and D'Aguesseau: Code Napoleon, Art. 1377, 1356, 2052; and was followed in Louisiana, *Tanner v. Robert*, 5 Martin, N. S., 260. In Scotland the Court of Sessions held the same opinion until the decision of *Wilson v. Sinclair*, in the House

of Lords of the United Kingdom, 4 Wils. & Shaw, 398. In Spain the rule was explicitly laid down that what is paid through ignorance of law cannot be recovered back: Institutes of Civil Law of Spain. Also Manuel Lib. 2, tit. 11, ch. 2. And the want of unanimity is further displayed in the Codes of Austria and Prussia: Burge on Conflict of Laws, Vol. 3, p. 729.

In the English common law courts the question was further complicated by the forms of action and the rules of pleading. In *Farmer v. Arundel*, 2 Wm. Bl. 824, Grey, C. J., said, that assumpsit would lie where money was paid by one man to another on mistake, either of fact or law. In *Bize v. Dickinson*, the question was fairly before the court; the debtor of a bankrupt, in ignorance of his right, paid the debt without taking advantage of a set-off to which he was entitled. In an action for money had and received Lord Mansfield gave judgment for the plaintiff, saying, "Where money is paid under a mistake of law, which there was no ground to claim in conscience, the party may recover it back in this kind of action: 1 Term Rep. 285; *Lowry v. Bourdieu*, Dougl. 468; *Ancher v. Bank*, Dougl. 637.

Bilbie v. Lumley, 2 East. 469, however, ignored the previous tendency of the courts. On argument for a new trial Lord Ellenborough inquired of counsel whether he could state any case where money had been recovered back when paid by mistake of law. If counsel had been prepared with the cases of Lord Mansfield's time, the result might have been different. As it was, counsel gave no answer, and the Chief Justice said that "every man must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might not be carried." This decision has had the widest influence both in England and America: *Brisbane v. Dacres*, 5 Taunt. 144; *Stevens v. Lynch*, 12 East. 37. Not only in the law courts, but in the court of chancery as well: *Goodman v. Sayers*, 2 Jacob & W. 249; *Currie v. Gould*, 2 Mad. Ch. 163; *Bramston v. Robins*, 4 Bingh. 11; *Ry. Co. v. Cripps*, 5 Hare, 90, *c.f.*; *Livesey v. Livesey*, 3 Russ. 287.

These cases, however, have lost their importance since the decision in *Rogers v. Ingham*, L. R., 3 Ch. D. 351, said to be the modern leading case upon this subject, Brett's *Modern Leading Cases in Equity*, p. 65. An executor was advised that a legatee was not entitled to certain interest, which had been paid to her. The legatee also took the opinion of her counsel which was the same, and the estate was divided accordingly. Two years later the legatee commenced this action submitting a new construction of the will and claiming repayment. It was held that such an action could not be maintained. Relief, said Lord Justice James, had never been given in the case of a simple money demand without intervening equities, Lord Justice Mellish adding, that he had no doubt that the court had power to relieve against mistakes of law, if there was any equitable ground which made it under the particular facts inequitable that the party who received the money should retain it. In *Daniel v. Sinclair*, 6 Appeal Cases, 180, the suit was to redeem a mortgage. The respondent on the erroneous supposition that compound interest was authorized, had consented that the accounts should be so kept, and had ratified them in writing. On appeal before the Judicial Committee of the Privy Council the overcharge was disallowed, Lord Monkswell remarking, that the line between mistakes of law and fact had not been so sharply drawn in equity as in law. *Powell v. Hulkes*, 33 Ch. D. 552.

Whatever may be the rule between ordinary adverse litigants the court finds no difficulty in giving relief where money has been paid to an officer of the court by mistake of law. The principle was applied in *ex parte James*, L. R., 9 Ch. 609, where a trustee in bankruptcy was ordered to repay money.

"The rule," said Lord Esher, "is not confined to the Court of Bankruptcy. If money by mistake of law has come into the hands of an officer of the Court of Common Law, the court would order him to repay it so soon as the mistake was discovered." The court would direct its officer to do that which any high-minded man would do: *Ex parte Simmonds*, 16 Q. B. D. 308. So also in Chancery, where trust money in

the hands of a trustee which had been paid to the trustee in liquidation by mistake of law, was ordered to be refunded: *Dixon v. Brown*, 32 Ch. D. 597; *In re Opera Limited*, 2 Ch. (1891) 154; see *Morrow v. Surber*, 97 Mo. 155.

In the United States the rule is not uniform, although the prevailing opinion supports the strict rule in *Bilbie v. Lumley* (*supra*). One of the earliest reported cases is *Levy v. The Bank of the United States*, decided in Pennsylvania and reported in 1 Binney, 27. In an action by a depositor to charge the bank with the amount of a forged cheque which he claimed should have been credited to his account, it was set up in defense that he had waived his right, having said, "if it is a forgery it is no deposit." "If he had said this deliberately," remarked Shippen, C. J., "knowing his right, it might have been obligatory on him, but it was the expression of an opinion of what he was willing to allow, and being under a mistake of his right, he is not bound by it." Very similar were the rulings in *May v. Coffin*, 4 Mass. 341, and *Warder v. Tucker*, 7 Mass. 452; *Cabot v. Haskins*, 3 Pick. 91. In the former the court said "we are all satisfied that what the defendant said of paying money from the payment of which he was discharged by law ought not to bind him." These cases, it will be noted, were not actions to recover back money paid, but upon promises to pay, made under a mistake of law, and are similar in the facts and circumstances to the case of *Stevens v. Lynch* (*supra*). The last decision in this line is *Churchill v. Bradley*, 58 Vt. 403. The defendant was surety on a note paid by the principal with a worthless bank note, and believing himself still liable signed a new note. It was held that his ignorance was no defence: *Haigh v. Brooks*, 10 Ad. & E. 309.

The decisions in Pennsylvania have not followed the line indicated by *Levy v. The Bank* (*supra*); *Colwell v. Peden*, 3 Watts. 327; *Espy v. Allison*, 9 Watts. 462. The question was thoroughly discussed in *Ege v. Koontz*, 3 Pa. 109. The action was *debt* to recover money paid voluntarily to the defendant who had claimed it as a debt due his assignor in bankruptcy. It was decided that there could be no recovery. "One person is not allowed," said Sar-

gent, J., "gratuitously to alter the position of another and affect his rights and liabilities by voluntarily assuming to understand his own legal duty and paying a claim on the footing of such an assumption, and then drawing it into question upon the allegation of mistake of his duty:" *Keener v. Bank*, 2 Pa. 237; *Boas v. Updegrove*, 5 Pa. 516; *Savings Institution v. Linder*, 74 Pa. 371. In *Union Ins. Co. v. City of Allegheny*, 101 Pa. 250, an action of assumpsit was brought to recover the amount of certain taxes paid under protest, the lien of which had been discharged by a judicial sale. It was held that the money had been paid without compulsion and could not be recovered back. But the decision was by a bare majority of the court; Sharswood, C. J., Trunkey and Gordon, JJ., dissenting. Certainly the case was one of great hardship, for part of the land was actually levied on and advertised for sale before the plaintiff paid the tax. A similar conclusion was reached in *Lamborn v. The Commissioners*, 97 U. S. 185, where the lands were actually sold and a trustee relying on the validity of the tax paid a sum sufficient to redeem them. In the Massachusetts case of *The Glass Co. v. City of Boston*, 4 Met. 181, payments to a tax collector were held compulsory and not voluntary and could be recovered back in an action for money had and received, the reason for the rule arising from the authority placed in the hands of the collector to levy directly upon the property of every individual whose name is on the tax list in default of payment of taxes. See *Magee v. Salem*, 149 Mass. 238.

In *Gould v. McFall*, 118 Pa. 455, the question of the payment of money came before the court on a rule to show cause why a writ of restitution should not issue. After judgment and execution defendant voluntarily paid the debt and costs a few days before a sale advertised. Subsequently the judgment was set aside. It was held that the writ of restitution should not be awarded as the writ is *ex gratia*, resting in the exercise of a sound discretion and that justice did not call for it in this case.

The United States courts have been particularly active in

enforcing the strict rule both in law and equity. The case that has been most frequently referred to in this connection is *Bank of U. S. v. Daniels*, 12 Pet. 320. The endorsers of a note protested for non-payment took it up, giving their own note for the amount with ten per cent. penalty. This penalty was afterwards discovered not to be due by them and application was made for an injunction to stay proceedings on the damages. The injunction was discharged, Catron, J., saying, "vexed as this question formerly was, and delicate as it now is from the confusion in which numerous and conflicting decisions have involved it, no discussion of cases can be gone into without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply. Indeed the remedial power claimed by courts of chancery to relieve against mistakes of law is a doctrine grounded rather upon exceptions than upon established rules. To this course of adjudication we are unwilling to yield." • See also *Elliott v. Swartwout*, 10 Pet. 137; *Railway v. Soutter*, 13 Wall. 517; *Allen v. Galloway*, 30 Fed. 466.

Still earlier the courts of New York were confronted with the question. In *Mowatt v. Wright*, 1 Wend. 355, although the mistake might almost have been called a mistake of fact, the court carefully reviewed the early English decisions and confirmed the rule that the money could not be recovered back. The parties were, however, in this case, bound by a compromise entered into in good faith.

Similar decision have been made in other States, which need not be set out at length: *Gilliam v. Alford*, 69 Tex. 267; *Galveston v. Graham*, 49 Tex. 303; *Campbell v. Clark*, 44 Mo. App. 249; *Smith v. McDougal*, 2 Cal. 586; *Connecticut M. Ins. Co. v. Stewardson*, 95 Ind. 588.

Beard v. Beard, 25 W. Va. 486, speaks both for West Virginia and the parent State: "It is now too well settled in Virginia and this State that where one voluntarily pays money to another with full knowledge of the facts, but under a mistake of law he cannot recover it:" *Shriver v. Garrison*, 30 W. Va. 456; *Harner v. Price*, 17 W. Va. 523; *Hugh v. Loan Ass'n*, 19 W. Va. 792. In *Erkens v. Nicolin*,

39 Minn. 461, where a party under ignorance of the rule of law that distances must yield to natural boundaries called for in a deed, paid money for a quit claim deed of property, which under this rule belonged to him, he could not recover back the purchase money so paid. "More mischief," said the court, "will always result from attempting to mould the law to what seems natural justice in a particular case than from a steady adherence to general principles." In the recent case of *Alton v. The Bank*, 157 Mass. 341, the plaintiff, an endorser, sought to recover the amount he had paid upon certain instruments, which both parties had erroneously supposed negotiable. It was held that, whether the mistake was one of fact or law, the plaintiff could not recover, it being a matter equally open for the inquiry and judgment of both parties, and the defendant had a right to assume that the plaintiff relied wholly on his own means of information. (*Cf. Bank v. Alton, infra.*)

While the rule is thus strongly laid down in the States mentioned above, the contrary is just as strongly maintained in other jurisdictions. In *Lawrence v. Baubein*, 2 Bailey's Law (S. C.), 623, mistake of law was set up as a defence in an action on a bond, and the question was gone into at great length both by counsel and court. The court, however, found a distinction between ignorance of law and mistake of law, and concluded that contracts founded upon a mistake of law ought not to be enforced. The distinction taken between ignorance and mistake has been severely criticised: *Schlesinger v. U. S.*, 1 Ct. of Cl. 25; *cf. Champlin v. Latyn*, 18 Wend. 407. And is now practically abandoned in South Carolina: *Cunningham v. Cunningham*, 20 S. C. 317; *Kei v. Andrews*, 4 Rich. Eq. 349.

In Kentucky it has been laid down that, whenever by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without cause or considerations, which in honor or conscience was not due and payable and which in honor or good conscience ought not to be retained, it could and ought to be recovered

back: *Ray v. The Bank*, 3 B. Mon. 510; *Gratz v. Redd*, 4 B. Mon. 190.

In *Culbreath v. Culbreath*, 7 Ga. 64, an administrator brought an action of assumpsit to recover money paid to defendant as part of distributive share of an estate, the payment having been made in ignorance of the law regulating the distribution of estates. The court below entered a nonsuit, but this was reversed above. After stating that the weight of the authorities was with them, the court continued, "If the authorities were balanced we would feel justified in kicking the beam and ruling according to that naked and changeless equity which forbids that one man should retain the money of his neighbor for which he paid nothing, an equity which is natural, which savages understand, which cultivated reason approves, and which Christianity not only sanctions, but in a thousand forms has ordained."

This remarkable opinion has been quoted with approval in the recent case of *Mansfield v. Lynch*, 59 Conn. 320, where it was held that an administrator, *d. b. n.*, could recover from the creditors of an estate the excess which they had been paid on their claims, over what they would have been entitled to had all the valid claims been allowed when presented to the original administrator. The court relied upon *Northrop v. Graves*, 19 Conn. 548, where it was said "we mean distinctly to assert that when money is paid by one under a mistake of his right and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether the mistake be one of law or fact, and this, we insist, may be done both upon the principles of Christian morals and the common law." These decisions involved a repudiation of *Bulkley v. Steward*, 1 Day, 133; see also *Rogers v. Weaver*, 5 Ham. (Ohio) 536; *Beatty v. Dufief*, 11 La. Ann. 74. It is not disputed that a mistake of the law of another State will be treated as a mistake of fact: *Haven v. Foster*, 9 Pick. 112; *Bank v. Dody*, 8 Barb. 233; *Morgan v. Bell*, 3 Wash. 154.

In *First Nat. Bank v. Alton*, 22 Atl. (Conn.) 1010, the court

declined to extend the principle in *Mansfield v. Lynch* (*supra*), to the extent of holding the defendant, an accommodation endorser of a note which proved non-negotiable, legally liable upon an implied promise to pay. "To hold" it was said in the opinion, "because the parties were mutually mistaken in the legal effect of the real transaction, justice would be subserved by the imputation in its place of a fictitious one, would be going further than we are aware that any court has yet gone and beyond what it seems to us proper and right or safe to do."

The subject, it will be seen, is full of difficulty to one who would attempt to state general principles applicable in all jurisdictions, but it is not difficult to ascertain the law in any given forum. The peculiarity is that, in almost every instance where the law *has* been laid down, it has been done in such vigorous and decided language that its meaning cannot be mistaken; there is no middle ground. Where, however, a recovery is allowed assumpsit would appear to be the proper form of action and is, indeed, the one usually adopted.

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DEERING & Co. v. KERFOOT'S EX.¹ VIRGINIA SUPREME
COURT OF APPEALS, DECEMBER 15, 1892.

FAUNTLEROY, J.—"The Commissioners reported as a matter of opinion that the widow of W. S. Kerfoot was entitled to dower in an undivided half interest of a storehouse and lot in

¹ Reported in 16 S. E. 671.

Berryville which was partnership property of Hardesty & Kerfoot, of which firm W. S. Kerfoot has been a member. To this report the creditors, who for the first time were before the court in the case, filed sundry exceptions. They denied that the widow was dowable in the property consisting in the storehouse and lot." The lower court decided that the said property was subject to the dower of Kerfoot's widow after the social debts were provided for. "In this the court erred. The record establishes beyond a doubt that the storehouse and lot in Berryville were part of the social assets of Hardesty & Kerfoot, and, being such, they were, in the eye of the law, personalty in which the widow could participate only as a distributee."

THE DEVOLUTION OF FIRM REAL ESTATE.

The principles of the common law, which were established for the government of a nation in which the chief index of wealth should be the ownership of land, and inheritance the only means of its transmission, were to a great extent unsuited to the relation of partnership, which had its origin in the early Roman law, and its growth and perfection in the maritime cities of Europe, where the claims of the heir were less prominent, and the calling of the merchant was not stamped with dishonor. Therefore, no small difficulty was experienced by the early English judges in adjusting the claims of the various interested parties, either among the principals themselves, or their creditors or third parties; and this at a time when the business of partnership was confined strictly to commerce and dealt only with articles of ordinary trade, which were, almost without exception, personal in their nature. But when, in later times, land came to be included among the firm assets, the difficulty was increased, for the principals of the feudal system had more fully fixed themselves on the law of real estate. The common law could recognize only such title to real estate as it already knew, and there was no known tenure which would satisfactorily answer the exigencies of the relation and properly protect the rights of the individual partners, and at the same time recognize the paramount claims of the

partnership creditors. Joint tenancy and tenancy in common were both tried and found wanting, as, in the former, on account of the doctrine of survivorship, the representatives of the deceased partner would be disappointed of their ancestor's share, which would go to the survivor under the well-known principles of the common law; while in the latter the individual creditors would have preference over those of the firm, and so a most important canon of partnership be defeated. In this embarrassment the assistance of the Court of Chancery was called in, which cut the knot by considering the real estate as converted into personalty as soon as it is brought into the partnership and made a firm asset. In this way the rights of all parties were satisfactorily protected, the firm creditors being first entitled to the proceeds of a sale of the land, and the remainder being distributed among the partners according to their interest.

This theory has, as a whole, remained unchanged up to the present time, although some of its corollaries have occasioned much difference of opinion, and although it has been earnestly contended that, upon a sound understanding of principles of partnership, the same result could have been attained without the introduction of legal fictions: James Parsons on Part., § 109.

The question which arose in the principal case, and a question which must immediately arise under the conversion theory, is the extent to which it is to be carried. If land belonging to a partnership is, so far as the principals are concerned, to be considered as personal property, how long is it to retain that character? And is the interest of a deceased partner in firm real estate to go to his heir or to his personal representative? Upon this last question there has been much diversity of opinion, and the doctrine held by the English and American courts is, with a few exceptional States, diametrically opposed. One of the earliest cases to rule the point was *Thornton v. Dixon*, 3 Cro. Ch. C. 199, decided by Lord Chancellor Thurlow in 1791. It arose out of the construction of a partnership agreement, and the Lord Chancellor, after determining that the agreement was not sufficiently clear to alter the course of

the law, awarded the fund in hand for distribution, in so far as it was derived from the personal assets of the late firm, to the personal representative of the deceased partner, and, so far as it was derived from the real assets, to the heir-at-law. This would seem to recognize a conversion *sub modo* only, and so to oppose the modern English doctrine. The decision was followed in 1802 by Sir William Grant, in *Bell v. Phyn*, 7 Vesey, 453, and in *Belman v. Shore*, 9 Vesey, 501, and by Sir Lancelot Shadwell in *Cookson v. Cookson*, 8 Sim. 529, so late as 1837. Notwithstanding the decision of Lord Thurlow, Lord Eldon, a few years later, laid down a different rule in *Townsend v. Devuynes*, 1 Montague Part., App. 97, and followed it, in 1814, by his judgment in *Selkrigg v. Davis*, 2 Dow. P. C. 231, where he is quoted as saying: "My own individual opinion is, that all the property involved in a partnership concern ought to be considered as personalty." The modern English decisions have followed this rule, so that Mr. Lindley (*Partnership*, 343, etc.) adopts the language of Vice-Chancellor Kindersly in *Darby v. Darby* (post), to the effect that "whenever a partnership purchases real estate for the partnership purposes, and with partnership funds, it is, as between the real and personal representatives of the partners, personal estate: *Phillips v. Phillips*, 1 My. and K. 649 (1833); *Fereday v. Wightwick*, 1 R. and M. 435; *Broom v. Broom*, 3 M. and K. 443; *Morris v. Kearsley*, 2 Y. and C. Ex. 139; *Houghton v. Houghton*, 11 Sim. 491; *Darby v. Darby*, 3 Drew, 495.

Sir Lancelot Shadwell, in 1845, refused to consider the conversion so complete as to subject the fund arising from a sale of firm real estate to the payment of probate duty: *Custance v. Bradshaw*, 4 Hare, 315; but even this point has been set at rest in the affirmative by the case of the Attorney-General *v. Hubbock*, L. R. 13 Q. B. D. 287, where it was decided by Lord Chief Justice Colridge and Lords Bowen and Brett that the real estate of a firm was converted out and out into personalty, and that the probate duty would attach: *Att'y-Gen. v. Marq. of Ailesbury*, L. R. 12 App. Cases, 672.

Although, as remarked a few lines back, *Cookson v. Cookson* (8 Sim. 529) adhered to the rule of *Thornton v. Dixon*,

the immediate decision was put upon the ground that the land had not been purchased with partnership funds, but had descended to the partners from their father; and also that, since no rights of creditors were involved, there was no occasion for the conversion. This distinction was pressed in several cases, and would seem to have been suggested by *Thornton v. Dixon* itself. It was not recognized, however, by Lord Justice James in *Waterer v. Waterer*, L. R. 15 Eq. 402 (1872), where he put the question finally to rest with the remark: "It seems to me immaterial how it (*i. e.*, the land) may have been acquired, whether by descent or by devise, if, in fact, it was subsequently involved in the business." And the same thought is well expressed by Lindley (Part. 343, etc.): "Notwithstanding *Cookson v. Cookson*, no satisfactory distinction with reference to the question of conversion can be drawn between land purchased with partnership moneys and land acquired in any other way, provided such land is, in the proper sense of the expression, an asset of the partnership. And this may be considered as the American rule, also: *Collumb v. Reed*, 24 N. Y. 305 (1862).

From these statements of the law the further proposition is easily deduced that, whether or not particular property is an asset of the partnership is a question, notwithstanding the name in which it is held, which may, as a general rule, be proved by parole evidence, notwithstanding the Statute of Frauds. This, however, is subject to the right of innocent third persons, without notice, who have depended on the record title or some similar circumstances: *Am. and Eng. Ency. of Law*, Vol. 17, p. 945; *Whaling Co. v. Borden*, 10 Cush, 458; *Shafer's App.* 106 Pa. St. 49 (1884). But see *Fairchild v. Fairchild*, 64 N. Y. 471 (1876); *Bird v. Morrison*, 12 Wis. 138 (1860).

Before noticing the American rule upon this subject, it may be well to look slightly at the reasoning which, in England, has given the land to the personal representatives, and in America has preserved the rights of the heir-at-law. The early English cases have given no definite reasons for the introduction of the conversion theory further than that stated in

the early part of this note. Mr. Parsons (Partnership, 369) suggests two rather historical grounds, to the general effect that, since partnership is an agent of trade, where a man puts land into the firm it must be treated as if he had actually sold it and contributed the proceeds. He also suggests the inequality in distribution in case of death, were any other scheme to prevail. The reason, as stated in many of the American cases is, that, having put land into the trade, it must be considered that a conversion was intended by the parties themselves, and that intention will, of course, prevail. Of all these reasons, the supposed intention of the parties is the basis. A very ingenious explanation of the rule was that advanced by Vice-Chancellor Kindersly in *Darby v. Darby* 3 Drew, 495 (1856). His argument, somewhat abridged, follows: "The clear principle of this court as to partnership is, that on dissolution all the property of the partnership shall be sold, and after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. This is the general rule; it is inherent in every contract of partnership. That the rule applies to all ordinary property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie." This principle is clearly laid down by Lord Eldon and Sir William Grant, and the right of a partner to insist on a sale of all the partnership property is just as stringent as a special contract would be. "If, then, this rule applies to ordinary stock in trade, why not to all kinds of partnership property?" He then shows that the same rule does apply to a lease for years where the rent is paid with firm moneys, and argues that the same rule must apply to a fee simple necessary for and paid for by the firm. Continuing, he says: "It may, therefore, be conceded that on dissolution all kinds of property may be compelled to be sold by the partners, or each representative of a deceased partner. Now, what is the doctrine of this court as to conversion? If a testator seized of real estate, devise it for sale, and direct that all the proceeds of such sale shall be

divided among certain persons so that each of the *cestui que trusts* is entitled to say he will have it sold and will take his share of the proceeds, that real estate is, in equity, converted into personalty; and so, if three persons contract that real estate belonging to them shall be sold and the proceeds be divided among them, so that each of them has the right to insist that it shall be sold, and that he shall have his share of the proceeds as money, that real estate is, in equity, converted into personalty, and if one of them dies while the property remains unsold, his share is personalty as between his heirs and personal representatives. Now, if it be established that by the contract of partnership all the partnership property is to be sold at the dissolution of the partnership, then any real estate which has become the property of the partnership becomes, by force of the partnership contract, personalty, and that not merely as between the partners to the extent of discharging partnership debts, but as between the real and personal representatives of the deceased partner." Although this statement of the law is from a high authority, and from the closeness and clearness of the reasoning would seem to carry considerable conviction, it does not seem to have been considered in any of the later decisions, and none of the American authorities which have so fiercely combatted the ultimate English rule have in any way attacked the reasoning of the Vice-Chancellor. Perhaps the same thought may be found in *Sumner v. Hampson*, 8 Ohio, 328 (1838), and in *Green v. Green*, 1 Ohio, 535 (1824), and possibly a few other cases; but in none is the doctrine so fully considered as in *Darby v. Darby*. It is open to the objection, which is especially weighty to an American, that it is entirely a deduction of legal and technical logic, the result of which is the establishment of a rule incomprehensible to the lay mind and contrary to ordinary common sense.

A number of the earlier American decisions adhered to the English rule, and a few of the States even yet hold to it in a more or less modified form. As early as 1824, the Supreme Court of Ohio held, in *Green v. Green*, 1 Ohio, 535, that a man had no such estate of inheritance in land held by a partnership

of which he was a member as to entitle his wife to dower in it upon his death, and the same rule still subsists in that State, with a modification to be mentioned later: *Rammelsburg et al. v. Mitchell et al.*, 29 Ohio St. 22 (1875); *Green v. Graham*, 5 Ham. (O.) 244 (1831).

Virginia, from whence came the principal case, adopted the same rule in 1839, and has adhered to it ever since. The reasoning of *Pierce v. Trigg*, 10 Leigh. 423, in which the rule was first laid down, is worth considering, especially in the case where land is purchased by the firm, with firm moneys; but it has no application to the case of land contributed by one partner, or, in fact, to land acquired in any other way. The court said: "Since upon familiar principles the land was purchased with personalty, it ought, as between the executor and heir, to replace the fund withdrawn from the personal estate." *Wheatly Heirs v. Calhoun*, 12 Leigh. 264 (1841); *Parrish v. Parrish*, 88 Va. 529 (1892); *Deering v. Kerfoot* (principal case).

By the decision of *Galbraith v. Gedge*, 16 B. Mon. 641 (1855), Kentucky laid the foundation for the same rule, although the land actually in question was awarded to the heir, but upon the ground that it did not appear that it was actually partnership property. But in *Cornwall v. Cornwall*, 6 Bush. (Ky.) 369 (1869), the land had been purchased with partnership funds, and clearly for partnership purposes, and although it was not necessary that it should have been sold for the payment of debts, the wife was awarded one-third of the proceeds as personalty, the court saying: "Where real estate is purchased with partnership funds for the purpose of carrying on and facilitating the partnership business and purposes, and it is used as a means of continuing and enlarging the partnership business, operations and profits, it then is partnership property, impressed with the character of personalty for any and all purposes, not only as between the partners *inter se*, and the firm and its creditors, but also as to distribution between the administrators and heirs." *Bank of Louisville v. Hall & Long*, 8 Bush. (Ky.) 672 (1871).

In the case of *Hoxie v. Carr*, 1 Sum. 173 (1832), Mr. Jus-

tice Story expressed a decided opinion in favor of the English rule, although the case before him did not actually raise the point; and Mr. Chancellor Kent (Com. III, 39), after noticing some of the American cases, says: "But the other American decisions are more restricted in their operation, and are not inconsistent with the more correct and improved view of the English law."

These instances mark the extent of the absolute conversion theory, in so far as it has been adopted in the American courts; but, as hinted a few lines back, even these are not as extreme in their scope as the rule laid down by Lord Eldon.

The basis of the whole theory of conversion is the supposed intention of the parties: *Coles v. Coles*, 15 Johns. 159; *Buckley v. Buckley*, 11 Barb. S. C. 43 (1850); *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631 (1855).

The parties may specially agree among themselves that the land shall be considered either real or personal property, and that agreement will control its character. This was clearly the opinion of Lord Thurlow in *Thornton v. Dixon* (*supra*), when he said the agreement under consideration "was not sufficient to vary the nature of the property." And Mr. Justice Story follows the same opinion: Story on Part., § 93 and n. See cases: *Bell v. Phyn*, 7 Vesey, 453; *Lindley on Part.* 343; *Goodburn v. Stevens et al.*, 5 Gill (Md.), 1 (1847); *Green v. Green*, 1 Ohio, 535 (1824); *Smith v. Jackson*, 2 Edwd. Ch. 28 (1833); *Lenow v. Jones*, 48 Ark. 557 (1886). Upon this theory, then, the question has arisen, what is a sufficient declaration of intention to change the nature of the property? This would seem to be the real point of divergence between the cases which hold to a conversion out and out, and those which hold to a conversion *sub modo* only. Thus it was said in *Coles v. Coles* (*supra*): "There may be special covenants and agreements relative to the use and enjoyment of the real estate, and in the absence of such special covenant the real estate owned by the partnership must be considered and treated as such, without any reference to the partnership." And in *Buckley v. Buckley* (*supra*), Judge Hand said that in the absence of any express intention, the presump-

tion is there should be no change in character. As a general rule the simple use and occupation of the land by the partnership is not sufficient to establish such an intention and consequent conversion, as may be seen by nearly all the cases in which the question has been considered. Yet in most of the United States where the absolute conversion theory holds, this fact *has* been considered as a sufficient declaration of the intention of the parties. Thus it was said in *Galbraith v. Gedge (ante)*: "If real estate purchased by partners with partnership means, for partnership purposes—that is be so purchased, to be used, dealt with, and disposed of as personalty, it should for commercial convenience partake of the character which the partners have thus impressed upon it, and upon the dissolution of the firm by the death of one of the partners, his share ought to belong as personalty to the executor or administrator, and not descend to the heir, and should in all respects be treated as personal estate."

But the land must be necessary for and actually used in the partnership or it will be converted only *sub modo*. This theory was well discussed in the case of *Runnelsburg et al. v. Mitchell et al.*, 29 Ohio St. 22 (1875), where the question of conversion was squarely before the court, Judge McIlvane says: "But what is a sufficient agreement? It need not be in writing—the intention may be shown from circumstances," merely bringing real estate into the partnership is not sufficient, but where "real estate is purchased for partnership purposes, paid for with partnership money, and used simply for the partnership business" such conversion is sufficiently shown. The line of demarcation between an absolute conversion, and a conversion *sub modo* is this, in the former it must be needed and actually used in the partnership business, in the latter it is sufficient that it was purchased with partnership funds: *Pierce v. Trigg*, 10 Leigh. 423; *Calhoun v. Calhoun*, 12 Leigh. 264.

It is generally admitted, however, that any agreement or provision which evinces a clear design that the land shall be considered and distributed as money will stamp its character, although such understanding does not appear in terms. Thus, such a provision in the will of a deceased partner will be suffi-

cient: *Woodbridge v. Watkins et al.*, 3 How. (Miss.) 360 (1839); *Davis v. Clark*, 82 Ala. 198 (1886); *Coster v. Clark*, 3 Edwd. Ch. 452.

Having noticed the English rule and its modifications in the United States we will proceed with a discussion of what may be termed the general American doctrine. It is thus stated in the American and Eng. Ency. of Law, Vol. 17, p. 953. Firm real estate "is to be regarded in equity as personal property so far only as may be necessary for the payment of debts and the adjustment of partnership accounts, the balance retaining all the incidents of real property." A great number of authorities may be cited for this, among which may be noted the following: Story on Partnership, § 93 and n.; Lindley on Partnership, 343, etc.; Scribner on Dower, II, 103; Shanks v. Kline, 14 Otto, 18 (1881); Platt v. Oliver, 3 McLean (U. S.), 27 (1842); Logan v. Greenlaw, 25 Fed. Rep. 299 (1885); Clay v. Field, 34 Fed. Rep. 375 (1888); Burnside v. Merrick, 4 Met. (Mass.) 537; Dyer v. Clark, 5 Met. (Mass.) 569 (1843); Wilcox v. Wilcox, 95 Mass. 255 (1866); Shearer v. Shearer, 98 Mass. 107 (1867); Keith v. Keith, 143 Mass. 262 (1887); Foster's App. 74 Pa. St. 391 (1873); Dubree v. Albert, 100 Pa. St. 483 (1882); Leif's App., 105 Pa. St. 505 (1884); Smith v. Jackson, 2 Edwd. Ch. 28 (1833); Coster v. Clark, 3 Edwd. Ch. 452 (1840); Buchan v. Sumner, 2 Barb. Ch. 548 (1847); Buckley v. Buckley, 11 Barb. S. C. 43 (1850); Collumb v. Reed, 24 N. Y. 505 (1862); Fairchild v. Fairchild, 64 N. Y. 471 (1876); Bopp v. Fox, 63 Ill. 540 (1872); Simpson v. Leich, 86 Ill. 286 (1877); Strong et al. v. Lord et al., 107 Ill. 25 (1883); Duhring v. Duhring, 20 Mo. 174; Holmes v. McGill, 27 Mo. 597 (1859); Grissom v. Moore, 106 Mo. 296 (1885); Young v. Thrasher, 21 S. W. (Mo.) 1104; Yetman v. Woods, 6 Yerg. (Tenn.) 20 (1834); Piper v. Smith, 1 Head (Tenn.), 937 (1858); Griffy v. Northcutt et al., 5 Heisk (Tenn.), 747 (1871); Jones v. Sharp, 9 Heisk (Tenn.), 660 (1872); Markham v. Merritt et al., 7 How. (Miss.), 437 (1843); Sykes v. Sykes, 49 Miss. 190 (1870); Robinshaw v. Hanway, 52 Miss. 713 (1876); Wheeler v. Sempler, 5 C. E. Grier (N. J.), 228; Campbell v.

Campbell, 30 N. J. Eq. 415 (1879); *Buffman v. Buffman*, 49 Me. 108 (1861); *Goodburn v. Stevens*, 5 Gill (Md.), 1 (1847); *Bird v. Morrison*, 12 Wis. 138 (1860); *Martin, etc. v. Martin*, 62 Wis. 418 (1885); *Smith v. Davis*, 82 Ala. 198 (1886); *Lenow v. Jones*, 48 Ark. 557 (1886); *Bowman v. Baily*, 20 S. C. 550 (1883); *Clay v. Stebbins*, 47 Mich. 296 (1882); *Hewett v. Rankin*, 41 Ia. 35 (1878); *Tellinghast v. Chapman et al.*, 4 R. I. 173 (1856).

A general summing up of these authorities would seem to amount to this, that upon the bringing of real estate into a firm as an asset, it is, in equity, converted into personality to all intents, so far as the partnership or its affairs are concerned, but that upon the settlement of the affairs of the partnership, that which is ascertained to be remaining in specie, or the balance of what has been sold for the partnership business and not used, will retain its natural character, and descend, in case of the death of a partner, in all respects as land. During the continuance of the relation, so far as the individual partners are concerned, the land is absolutely converted, and a judgment against one will not bind his share in it: *Meily v. Wood*, 71 Pa. St. 488 (1872); *Leif's App.* 105 Pa. St. 505 (1884).

And it has even been held that equitable ejectment will not be for a partner's interest in firm real estate, because there is no such legal title as will support it: *Du Bree v. Albert*, 100 Pa. St. 483 (1882).

However reasonable these expressions of the law may appear on their face, there is a manifest inconsistency when we remember that in all this line of cases the right of the widow to her dower is never doubted, and that right can only attach to land of which the husband has a legal seizen in his lifetime: *James Parsons on Part.*, § 109.

But the question can now hardly be considered an open one. The right of the widow to her dower, and of the heir to his inheritance depend upon the same theory, and what will support the one, must support the other: *Dyer v. Clark*, 5 Met. (Mass.) 569; *Goodburn et al. v. Stevens et al.*, 5 Gill (Md.), 1.

While the reasons given for the English rule are few and in

the main unsatisfactory, those which have been advanced in America as the basis of the right of the heir are somewhat diverse, and while the result is in the end the same, that end is reached sometimes by different paths. It has been held in a number of cases that, immediately upon the death of a partner, the land descends to the heir and surviving partner as tenants in common, subject to an implied trust for the benefit of the creditors of the partnership, and that the survivor may make a valid conveyance of the land for their benefit. It will not, however, be a complete conveyance, since the heirs, who have an equal right, have not joined in the deed, but the court will compel them to do so in a proper case: *Delmonico v. Guelaume et al.*, 2 Sanf. Ch. 366 (1845); *Griffy et ux. v. Northcutt*, 5 Heisk (Tenn.), 747 (1871); *Jones v. Sharp*, 9 Heisk (Tenn.), 660 (1872); *Shanks v. Kline*, 104 U. S. (14 Otto.) 18 (1881).

Nearly the same view was taken in the case of *Martin, etc., v. Martin*, 62 Wis. 418 (1885), where the court said: "While there were debts, Hall, held as surviving partner and trustee for the creditors of the firm, but on winding up he was trustee of the balance for the benefit of the heir of the deceased partner, as against the personal representatives."

Judge Hammond in *Logan v. Greenlaw*, 25 Fed. Rep. 299 (1885), advanced quite a new and original opinion when he said: "In my view of it the land descends only *sub modo* and they (that is, the heirs), do not hold so much as heirs at law, but rather as statutory assignees, or distributees of the surplus proceeds of partnership real estate."

These expressions of opinion show clearly, by their variety and difference, the lack of positive and certain foundation for the conversion fiction as a whole, and demonstrate the misfortune which Mr. Parsons has pointed out (*Partnership*, § 109), that it was ever thought necessary to introduce it.

The course of reasoning by which the American rule has been established is well shown by the able opinion of Justice Sharswood in *Foster's Appeal*, 74 Pa. St. 391 (1873). An abridgement of it follows: "Conversion is altogether a doctrine of equity . . . it is admitted only for the accomplish-

ment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit equitas* has redoubled force in application to it. It follows of necessity that it is limited to its end. There must be some purpose recognized as lawful to be accomplished before equity will allow it to have place." "Land of a partnership when sold by the firm becomes land again in the hands of the purchaser, and the proceeds personalty; but personalty to what extent? Only to the extent of accomplishing the conversion, namely, the equity of the partners to have the joint debts and their own advancements paid, before any part goes to the other partners or their separate creditors." He concludes this branch of the opinion as follows: "If the land remaining in specie after the partnership is dissolved and wound up, and all the purposes of conversion answered is still personal property, how long is it to remain so? Certainly, all the forms of law as to real estate must be observed from hand to hand, and shall it not be subject to the lien of judgments in the lifetime, and debts upon the death of the owner? If not, uncertainty and litigation will indelibly mark its character. But it may be asked, when is the exact moment of its re-conversion? The answer is, the moment the partnership is wound up either by decree, judgment, or agreement, and it is determined that it no longer forms part of the partnership stock, and is not required for its purposes." This is certainly a strong case, not only on account of its high authority and able reasoning, but because of the practical common sense of the rule evolved. It has frequently been cited as an authority in other jurisdictions, and when considered with the opinion of Justice Shaw, of Massachusetts, in *Dyer v. Clark*, 5 Met. 569 (1843), and Justice Wells in *Shearer v. Shearer*, 98 Mass. 107 (1867), the whole learning on this branch of the law is pretty well covered. The following language from the last case should be quoted as a supplement to that from Foster's Appeal. "It would seem, therefore, that conversion should be made only when, and so far as is required for that purpose (*i. e.*, adjusting the affairs of the partnership) and that the effect on the descent or distribu-

tion of the share of a deceased partner among his representatives should be regarded as an incident merely, and not an end for which the interference of a court of equity is to be sought."

Upon this subject there is but a single further point to be noted. It was raised in Pennsylvania in the case of *Leaf's Appeal*, 105 Pa. St. 505 (1884). The partnership agreement provided that all real estate should be personal property and that the firm should not be dissolved by the death of a partner, but only by the consent of all. The firm acquired a large amount of real estate with its profits. One partner died leaving children, and a wife who subsequently married again and died. The widow, by will, gave all her interest in the firm, of which her deceased husband was a member, to her second husband, who claimed the dividends of the firm as the proceeds of personal property, as against the heir at law, who claimed that, for purposes of descent, the partnership land was to be considered as unconverted. The court considered the contract not to dissolve on the death of a partner valid (*Loughlin v. Lorenzo*, 48 Pa. St. 282; *Burwell v. Manderson*, 2 How. 576; *Jones v. Walker*, 13 Otto. 446), and held that since the firm was still existing its real estate was to be considered and to descend as personalty, and that the second husband was entitled to receive the dividend on one-third of the one-fifth interest held by the deceased member. This is not inconsistent with the general rule, and alone is not surprising. But the language of the court which follows is not so satisfactory and would seem, to some, open to grave question, at least on account of its practical effect. Justice Green, after confirming the doctrine of *Foster's Appeal*, in a case where the affairs of the firm were wound up, and distinguishing the circumstances of the case before him, concludes his opinion with the following language (pp. 513, 514): "It cannot now be known that the real estate will not be required for the payment of debts. The firm still continues its business under a lawful agreement to that effect. Whenever a dissolution shall be established, and a final settlement of accounts shall take place, the positions contended for and the reasons by which they are enforced will become entirely appli-

cable and will exercise a very potent and possibly controlling influence upon the question which will then arise between the present litigants or who may succeed them."

The action was simply for the income, and the principal fund was not contended for, but it is difficult to see how one set of claimants can be entitled to that income, during the continuance of the partnership, and immediately on its dissolution, another set become entitled—not by reason of any act by any individual, but simply by the act of the law—operating through the fact of dissolution.

Ordinarily, the rights of the claimants in the estate of a deceased person are fixed at his death, and once vested cannot be divested, save by special provisions or circumstances; but the rule here laid down, unless made necessary by peculiar circumstances not appearing in the report, may unsettle this rule and give rise to considerable uncertainty in the future. Truly the language is dictum only, but it is worth considering.

Upon the subject of firm land generally, and its disposition after the death of a partner the student will find additional information in the American and Eng. Ency. of Law, Vol. 17, p. 952, &c., where many authorities are cited. In an article on Firm Real Estate in the Albany Law Journal, Vol. 32, pp. 284, 304, 326, and the able note of Judge Arnold to Foster's App., 13 Am. Law. Reg., N. S. 300, beside the generally full treatment of the matter in most of the leading text books.

C. WILFRED CONARD.

Phila., Pa., May 9, 1894.

DEPARTMENT OF CARRIERS AND TRANSPORTATION COMPANIES.

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DEMING & CO. v. MERCHANTS' COTTON PRESS.¹ SUPREME
COURT OF TENNESSEE.

Loss by Fire of Goods in Storage—Liability of Carrier.

When a carrier has effected an arrangement with a compress company to act as the carrier's agent, and receives cotton in agent's press, and accepts delivery there by the shipper, instead of at the carrier's own depot, and upon such delivery issues the ordinary carrier's bill of lading, stipulating for exemption from loss by fire, it will not be construed to relate to fire in the cotton press.

LIABILITY OF CARRIER FOR LOSS OF GOODS IN STORAGE.

I.

STORAGE BEFORE TRANSPORTATION HAS BEGUN.

1. A carrier is, in general, liable for a loss by fire occurring after the carrier has, by issuing a bill of lading, by giving a receipt or other act, taken exclusive possession of the goods for the purpose of transportation, even though the transportation has not yet begun.

In *Forward v. Pettard*, 1 T. R. 33, a wagoner had received the goods for carriage upon his wagon and had placed it, securely, as he thought, under shelter, until the time should arrive for his departure. In the meantime a fire originated at a considerable distance from it, but spread so rapidly that before the wagon could be removed it was reached by the flames and burned. Lord Mansfield held that the carrier was liable for the loss.

In *Southern Express Company v. MacVeigh*, 20 Grat. 264

¹ Reported in 90 Tenn. 310.

Virginia (1871), it was held that if goods are under the control of parties as forwarders, not as common carriers, and are consumed by an accidental fire in a warehouse, without any fault or negligence on their part, they are not liable; but when goods are delivered to the carrier to be forwarded and transported and the carrier receives compensation for so doing, the goods are in his custody as a carrier, and if he delays the carriage, and the goods are in the meantime destroyed, he is liable.

2. After goods have been delivered to the carrier, but something yet remains to be done by the shipper before they are ready for transportation, or some directions or instructions are to be given, the carrier is not liable, as a carrier, for the loss of the goods by fire while waiting transportation, but only as a warehouseman.

In *Pittsb., Cin. & St. Louis Ry. Co. v. Barrett*, 36 Ohio St. 448 (1881), goods were received by a railroad company to be forwarded in the usual course of business, and were lost by an accidental fire in the carrier's warehouse while awaiting transportation. It appeared that there was a general custom known to the plaintiff, that the company did not issue bills of lading until the goods were actually started, and that they always issued bills of lading containing a clause limiting their liability for loss by fire. It was held that the company was not liable for the loss.

3. A railroad company is not liable as a common carrier for goods destroyed by fire, where the goods have merely been delivered at a station and have not been accepted for transportation by issuing a bill of lading, or receipt or by other act of the carrier.

In *Kansas City M. & B. R. R. Co. v. Lilly* (Miss.), 8 So. 644, which was an action against a company for loss by fire of cotton deposited at a switch where there was neither agent, station nor platform, it was held that an instruction that, if plaintiffs contracted with defendants to furnish a car for shipment of the cotton, and failed to do so, by reason of which the cotton was damaged by fire, defendant is liable, should be refused where there is no evidence connecting the fire with the failure to furnish a car.

4. Where a railroad company receives goods under a bill of lading relieving it from liability for loss by fire, and with the permission of the consignor, stores the goods in its warehouse to await shipment, the company is not liable for the loss of the goods by a fire which occurred without the company's negligence.

In *Lancaster Mills v. Merchants' C. P. & S. Co.* (Tenn.), 14 S. W. 317, a bill of lading of cotton gave the railroad company the privilege of compressing the cotton at its own expense for convenience of carriage, and exempted it from loss by fire while at depots, stations, and warehouses. *Held*, that the company was not liable as carrier for loss of the cotton by fire, not caused by negligence, while stored in a warehouse for compression, though the warehouseman had received the cotton as agent of the railroad company.

II.

STORAGE DURING THE COURSE OF TRANSPORTATION.

1. Where goods have been received by a railroad company, to be transported to a point beyond its own line, and after being carried over its own line, while they are stored in its warehouse awaiting transportation by the connecting carrier, the liability of the company is that of a common carrier and not that of a warehouseman.

In *Railroad Company v. Manufacturing Company*, 16 Wall. 318 (1872), goods were delivered to a railroad company to be transported from a point in Michigan to a point in Connecticut. When the goods reached the terminus of a railroad at Detroit they were detained awaiting a steamboat for a period of six days, when they were destroyed by an accidental fire, which burned down the railroad depot. *Held*, that the railroad company was liable for the loss.

In *Condict v. Grand Trunk Ry. Co.*, 54 N. Y. 500 (1873), goods were detained at the end of the first railroad company's line for six days, awaiting transportation by a connecting line of a railroad, when they were destroyed by a fire in the first company's depot. It was held that the company was liable for the loss.

In *Miller v. Steam Navigation Co.*, 10 N. Y. 431, the carrier had deposited goods upon a float, or floating warehouse, for further transportation by another carrier. A fire broke out a quarter of a mile distant, and very soon afterwards a gale of wind suddenly sprung up and blew the fire in the direction of the float; which, in a few minutes, it reached, and the goods were consumed by it. It was held that the carrier was liable for the loss.

2. Where goods are awaiting re-shipment to their destination in a carrier's warehouse, and the bill of lading exempts the carrier from liability for loss by fire, the owner of the goods cannot recover, unless he proves that the company was negligent.

In *Denning v. Norfolk & West. R. R. Co.*, 16 Am. & Eng. R. R. Cas. 232 (1884), a railroad company received cotton from a preceding carrier on the line of transportation. The bill of lading exempted the company from liability for loss by fire occurring either while the cotton was in actual transit or in store awaiting transit. The company carried the goods and tendered them at the wharf of a steamship company next in the line of carriers. The company had no knowledge that the steamship company could not at once transfer the cotton, but place it at the latter's request on the latter's wharf and in its warehouse. While so stored the cotton was destroyed by fire. *Held*, that the railroad company was not liable for the loss.

In *Hornthall v. Roanoke, N. & B. Steamboat Co. (N. C.)*, 11 S. E. 1049; 107 N. C. 76 (1891), which was an action against a carrier for goods destroyed by fire in a carrier's warehouse, where they were awaiting re-shipment to the point of their destination, it was held that plaintiff could not recover under a bill of lading exempting the carrier from liability for such loss, unless he proved negligence, and, in order to rebut the imputation of negligence, it was competent for the carrier to show that there was an accumulation of freight in the warehouse which could not be moved on account of the low stage of water; and, that on account of such accumulation, plaintiff's goods were detained in the warehouse until the occurrence of the fire.

3. Where goods are on cars in actual course of transportation under a bill of lading containing no limitation on carriers' liability and are destroyed by fire, the carrier is liable for the loss.

4. Where goods are on cars in actual course of transportation under a bill of lading, relieving a carrier from liability for loss by fire, and the goods are destroyed by fire, the carrier is not liable unless the fire originated from the carrier's negligence: *York Co. v. Central R. R.*, 3 Wall. 107 (1865).

III.

STORAGE AFTER TRANSPORTATION IS COMPLETED.

1. Where goods delivered to a railroad company for shipment have reached their destination, and after notice to the consignee, or with his consent, have been stored in a warehouse of the company, the railroad company is liable as a warehouseman for hire, and not as a common carrier; and if the goods are destroyed by fire while in the warehouse, without negligence on the part of the company, the railroad company is not liable.

In *Turrentine v. Wilmington & Weldon R. R. Co.*, 100 N. C. 375 (1888), a railroad company, after the carriage of goods over its road was complete, had them in its warehouse with the owner's consent. A fire broke out near the warehouse, but not in the property of the company. While the fire was burning, plaintiff asked permission to remove the goods, but was refused, because the officers of the company were afraid that if the warehouse was opened much of the property therein would be stolen, also because there did not seem to be immediate danger. The fire reached the warehouse and the goods were destroyed. *Held*, that the plaintiff could not recover the value of the goods.

In *Wald v. Louisville, E. & St. L. R. Co. (Ky.)*, 18 S. W. 850 (1891), plaintiff's agent, a passenger on defendant's road, on arriving at his destination, left plaintiff's trunks of samples in the care of defendant's agents, and they were put in the station. The same evening a traction-engine was put off defendant's cars at this place, and was moved about forty feet from the station, but was still on defendant's

Those in charge of the engine filled the boiler with water, which defendant's agent probably observed. About two hours after the arrival of the engine defendant's agents closed the station, and went home, and no watchman was left on the premises. About midnight the engine was moved away by steam. Before morning the station was discovered to be on fire at the end nearest to the place where the engine had been, and the station, together with plaintiff's trunks, were destroyed. There was no evidence that defendant's agents had any reason to believe that the station was endangered by the engine's proximity to it. *Held*, that no negligence on the part of defendant was shown, its responsibility being that of a warehouseman for hire, and not that of a common carrier.

In *Black v. Ashley* (Mich.), 44 N. W. 1120, it was held that where a common carrier is accustomed to deliver goods transported by it to a warehouseman, who was independent of the carrier, and by whom the consignees are notified of the arrival of such goods, and the consignees are aware of the custom, and have long acquiesced in it, the liability of the carrier ends with the delivery of the goods to the warehouseman, and no recovery can be had against the carrier for their subsequent destruction by fire.

2. It has been held in some cases that even where no notice has been given to the consignee of the arrival of the goods, the company upon storing the goods relieves itself from liability as a common carrier.

In *Butler v. East Tenn. & Virg. R. R. Co.* (Tennessee), 9 Am. & Eng. R. R. Cas. 249 (1881), it was held that the liability of a common carrier ceased when the freight was deposited in a warehouse, and was not intended by the Act of 1870, ch. 17 (Code, § 1993), requiring the company to give a prescribed notice to the consignee.

In *East Tenn. Virginia & Georgia R. Co. v. Kelly* (Tenn.), 17 L. R. A. 691 (1892), it was held that a railroad company is not liable as a common carrier for goods destroyed by fire after they are unloaded and stored in its depot, although the consignee had repeatedly called for them and been told that they were not there.

In *Hilliard v. Wilmington & Weldon R. R. Co.*, 6 Jones (N. C.) 343, it was held that where an article was carried on a railroad and the consignee lived sixteen miles from the road, and no agent was present to receive it at the depot where it was to be delivered, and it was deposited in a warehouse belonging to the company, the company's liability ceased as a common carrier, and it was only bound as a warehouseman for ordinary neglect.

In *Neal v. Wilmington & Weldon R. R.*, 8 Jones (N. C.) 482, it was held that where goods are carried on a railroad from one station to another, if the owner is not ready to receive them at their destination, the duty of a railroad company as a carrier is discharged by putting the goods in the warehouse of the company without giving notice to the consignee or owner, who lives at a distance.

3. A railroad company is ordinarily liable as a common carrier for the loss of goods by fire where the goods have reached their destination, but have not been unloaded from the company's cars.

In *Dunham v. Boston & A. R. Co.*, 46 Hun. 245, it was held that a railroad company is liable for goods destroyed in its cars by fire on the night after their arrival, if the consignee, immediately on notice of their arrival, begins to remove them, using a reasonable number of teams, and discontinues his labors only at the end of the usual working hours of the day.

In *Missouri Pac. Ry. Co. v. China Manufg. Co.*, (Tex.) 14 S. W. 785, 79 Tex. 26, cotton was destroyed while on two cars standing on a side track near a compress. It did not appear what effort was made to save the cars, nor what precautions had been taken for the protection of cotton in cars on the side track. It was held that the evidence did not show that the loss occurred without fault on the part of the carrier.

In *Draper v. Delaware & H. Canal Co.*, 23 N. E. 131, 118 N. Y. 118, a railroad company received goods for transportation, and gave a bill of lading, which stated that, after arriving at their destination, the goods should be held under the liability of a warehouseman, when they were placed in the storeroom, or were to be taken from the car by the consignee.

They were kept in a freight car for several days after reaching their destination, and were then destroyed by fire. Before the fire the owner's agent had been wrongly informed that they had been unloaded, at which he expressed regret, and requested the company to store the goods for a few days. *Held*, that the company was not liable as a common carrier.

4. Where goods have been delivered to a railroad company in loaded cars to be transported to a side track on its road, where they are to be unloaded by the consignee, the company is not liable as a common carrier for the destruction of the cars by fire after they have been placed on the side track designated.

In *Peoria & P. U. Ry. Co. v. United States Rolling-Stock Co.* (Ill.) 27 N. E. 59 (1891), it was held that where a railroad company which receives loaded cars to be transported to a certain side track on its road, there to be unloaded by the consignee of the cargo, and then to be transported by the company to its yard, is not liable for the cars as a common carrier when destroyed by fire while they are standing on the side track to be unloaded.

IV.

ON CONNECTING LINES.

1. In the United States a carrier is not ordinarily liable for a loss by fire occurring on the line of a connecting carrier.

In *Balt. & Ohio R. R. Co. v. Schumacher*, 29 Md. 168 (1868), the court citing *Redfield on Railways*, said: "The general rule of the American courts is, that in the absence of special contract, the rule laid down in the earlier English cases, that the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier, is the more just and reasonable one." In this case there was a loss of oil by leakage, and a connecting carrier where negligence caused the loss was held liable.

In *Phillips v. North Carolina R. R. Co.*, 78 N. Car. 294 (1878), it was held that in the absence of a special contract where goods are delivered to railroad company for transportation, though worded for a place beyond its own terminus, the carrier discharges its duty by safely conveying over its own road, and then delivering to the next connecting carrier in the

direct and usual line towards the point of ultimate destination. See also to the same effect: *Harris v. Ry. Co.*, 371; *Grover & Bader Co. v. Ry. Co.*, 70 Mo. 672; *McConnell v. R. R. Co.*, 86 Va. 248; *Clyde v. Hubbard*, 88 Pa. 358. *Myriell v. R. R. Co.*, 107 U. S. 102, and numerous other cases cited in *Hutchinson on Carriers*, § 149 (2d Ed., 1891).

2. In Virginia the carrier is liable, unless he is released from liability in writing by the shipper.

Code of Virginia (1887), § 1295: Prior to the code the liability of the carrier was limited to a loss occurring on its own line, unless there was an express contract to carry the goods to their ultimate destination: *McConnell v. Norfolk & West. R. R. Co.*, 86 Va. 248 (1889).

V.

ACT OF GOD OR PUBLIC ENEMY.

A carrier is not liable for the loss of goods by fire, where the fire was caused by the act of God or the public enemy: *Hutchinson on Carriers*, §§ 170-a and 203 (2d Ed.) 1891.

VI.

WHERE CARRIER IS RELIEVED BY SPECIAL CONTRACT.

1. A carrier may stipulate for exemption from liability, in case the goods are lost or injured by fire; and if he does so, the measure of his obligation is ordinary diligence; but if the fire is caused by his negligence, or if he negligently places or leaves the goods in a place of danger, he cannot, by such a stipulation, escape liability: *Hutchinson on Carriers*, § 248-b, citing *Little Rock, etc., Ry. Co. v. Daniels*, 49 Ark. 352; *Rand v. Transportation Co.*, 59 N. H. 363; *Louisville, etc., R. Co. v. Manchester Mills*, 14 S. W. Rep. 314; *McFadden v. Railway Co.*, 92 Mo. 343. See also to the same effect: *York Co. v. Central R. R. Co.*, 3 Wall. 107 (1865).

2. In Virginia and West Virginia the value of the goods shipped may be fixed in the bill of lading, as a limit of the liability of the carrier in the case of loss through its negligence. It is otherwise in Ohio.

In *Richmond & Danville R. R. Co. v. Payne*, 86 Va. 481, (1890) horses were shipped under a bill of lading, fixing the

value of each horse at \$100. The court held that the shipper could not recover more, although the horses were injured by the railroad company's negligence. Lewis, P. J., said: "When the shipper signs a bill of lading, not exempting the carrier from liability for the negligence of himself or his servants, but limiting the amount in which the carrier shall be liable, in consideration of the goods being carried at reduced rates, such a contract fairly entered into, is valid and binding, and we see no reason, when its terms are just and reasonable, it should not be."

In *Zoust v. Chesa. & Ohio Ry. Co.*, 17 L. R. A. 116 (1892), the facts were similar, and the court reached the same conclusion.

In *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, the carrier assumed liability in a live stock contract for "horses and mules, not exceeding \$200 each." The court held that the shipper could not recover an amount exceeding \$200 for each of the five horses shipped, although it appeared that they were valuable race horses.

In *Muser v. Holland, etc.*, 17 Blatchf. 412, the shipper took a receipt exempting the company from loss by fire and from liability beyond \$50. *Held*, that the shipper could not recover an amount in excess of \$50.

3. In Ohio the carrier is liable to the full extent of the value of the goods, where the loss has occurred through his negligence, although there is a limitation on the value of the goods in the bill of lading.

In *United States Express Co. v. Backman*, 28 Ohio St. 144, whisky was accepted by a carrier, and the value stated in the bill of lading was \$20 per barrel.

ASHBURN, J., said: "This company cannot stipulate against its own negligence; such a stipulation would be contrary to public policy. But in all other respects a common carrier may limit his liability in case of loss by special contract. If the defendant lost this whisky by its own negligence, it cannot restrict its liability to \$20 a barrel; if as may be admitted, it was advised of the nature and value of the article to be transported, and if this whisky was, in fact, worth more than \$20 a barrel at the time.

W.

NOTES AND COMMENTS ON RECENT DECISIONS.

EXECUTORS AND ADMINISTRATORS.

Title of executor to notes against testator.

A somewhat remarkable decision was arrived at in *Hoffer's Estate, etc.* 156 Pa. 473, which we overlooked at the time but which deserves notice. This was an appeal by the guardian of Thomas Minors from the decree of the Orphans' Court sustaining exceptions to the report of the auditor of the account of the executor of Hoffer, deceased.

The auditor had refused to allow credit for two notes made by decedent and payable to accountant. Both notes were overdue at the date of the decedent's death. There was evidence that the notes were in possession of accountant's wife immediately after decedent's death, and were handed over by her to accountant.

Exceptions to the auditor's report were sustained by the court (McPHERSON, J., delivering the opinion) on the ground that an executor, who is the payee of the note of his decedent, which is overdue at the time of the decedent's death, must show clearly that he held the note by a title hostile to that of decedent, which he may do by showing that the note was in the custody of his wife immediately after the decedent's death.

This decision, which was accepted without comment by the Supreme Court, practically amounts to this, that, although fraud is never assumed but must be proved, an executor holding notes of a testator is *presumed to have stolen them unless he can prove that he was the holder at the time of the death.* That he was once the holder the paper proves, but payment and subsequent theft are presumed though liable to be disproved.

When we turn to the authority on which this remarkable

deduction is founded we find it was the case of a note signed by a marksman, not witnessed and, therefore, without any outward sign of inward validity, moreover its existence was wholly inconsistent with proof of the holder's admissions that he was not a creditor. (McMahon's Est., 132 Pa. 179.)

We have quite enough instances of inverted reasoning without adding more to the list, even though it may be but a single dictum. That it could have entered into the mind of the most suspicious to suggest such an argument is bad enough; to have it accepted by a court is serious and deserves notice.

RECENT CORPORATION CASES.

In 150 U. S. 371, there is reported a most interesting decision upon the limits of the doctrine that the capital stock of a corporation is a trust fund for the payment of debts. Our readers will remember that in the AMERICAN LAW REGISTER AND REVIEW for February, 1893 (32 Am. L. R. & Rev. 175), we published an editorial review of some of the more important decisions of the Federal Courts which bear upon this question. In view of such considerations as must suggest themselves to every careful reader of these judicial utterances, we ventured to give our adherence to the opinion that the attributes of a trust fund are in many respects wanting in the case of capital stock, and that the use of the term is not only not helpful, but actually misleading. *A propos* of these comments (which included a resumé of an article on this subject from the pen of R. C. McMURTRIE, Esq.), it is interesting to examine the decision above referred to, *Hollins v. Brierfield Coal & Iron Co.* In this case a trustee of a corporate mortgage had instituted proceedings thereunder which resulted in a decree for the foreclosure of the mortgage deed and a sale of the property. Sometime after the commencement of this suit, but before the decree, Hollins and others filed a bill in the same court, making the corporation, the trustee, and sundry stock and bond-holders, parties defendant. The plaintiffs were unsecured creditors of the company, whose claims had accrued several

years after the issue of the mortgage bonds; and, after stating their claims, they alleged that the mortgage conveyance was absolutely void, and that a large amount was still due on the stock. They prayed for the appointment of a receiver and for the sale of the property in satisfaction of their claims, and they asked that the receiver be given authority to collect the unpaid stock subscriptions for their benefit. They alleged the pendency of the trustee's suit, but did not ask to intervene. The bill was dismissed upon the merits. Upon appeal, the Supreme Court, in an interesting opinion by Mr. Justice BREWER, sustained the decision of the court below in dismissing the bill, but decided that it should have been dismissed, not upon the merits, but for want of jurisdiction. Mr. Justice BROWN and Mr. Justice JACKSON dissented, but gave no reasons for their dissent. Mr. ALEXANDER T. LONDON, for the appellants, strenuously contended that unsecured creditors of a corporation have a right to proceed in equity, without first reducing their claims to judgment at law. He relied upon the general principle recognized in *Case v. Beauregard* (101 U. S. 688), that whenever a creditor has a trust in his favor or a lien upon property for a debt due him, he may go into equity without exhausting his legal remedies. He then claimed the benefit of the many decisions to the effect that the capital stock of a corporation is a trust fund for the benefit of creditors and insisted that it is a necessary conclusion from these premises that a corporate creditor, without judgment, may come into a court of equity upon the insolvency of the corporation to protect the trust fund and to enforce his lien. He also cited expressions of judicial opinion that such a course is in strict accordance with principle and quoted the language of Mr. Chief Justice WAITE in *Terry v. Anderson* (95 U. S. 628).

The argument upon these grounds is conceived to be formally valid, and the conclusion follows from the premises as a matter of logical necessity. As the conclusion, however, was too preposterous to be accepted, and since the major premise contained a statement of law which was indisputable, the court was compelled either to deny the validity of the syllogism as a mode of inference or else to deny a distinctive attribute of

trust fund to the capital stock of a corporation. Fortunately the court adopted the latter alternative, as appears from the following quotation:—"While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund, held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pomeroy's Equity Jurisprudence, § 1046, they 'are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor.'"

In other words, this decision denies the necessary validity of deductive arguments based upon the postulate of the trust fund. In a science where analogy is out of place and metaphor is misleading, such a decision is in effect a judicial declaration that the so called trust fund is not a trust fund at all.

LANDLORD AND TENANT LAW.

In the case of *Shermer v. Paciello*, 34 W. N. C. p. 252, the Supreme Court of Pennsylvania passed upon the important question of the right of a sub-tenant to resist proceedings in ejectment instituted by virtue of an authority contained in the lease—the lease containing a prohibition against sub-letting. It appeared that the plaintiff let certain premises to the defendant in August, 1893. In October, 1893, the defendant called at the office of the plaintiff's agent, handed him the keys, and said that he had moved. When the agent went upon the premises, he found Banner Herman in possession of a part of the building and conducting a dry goods business for himself. The lessor's agent, for the purpose of obtaining possession, left on the premises a notice to the defendant, the original lessor, to give security within five days for three months' rent or deliver possession. The notice fell into the hands of Herman, who tendered the security, which was refused, and judgment in ejectment was entered. Herman had been a sub-tenant for some months, but of this neither the plaintiff or his agent had any knowledge.

The question presented was to (1) the right of the sub-tenant

to resist the proceedings in ejectment instituted by virtue of the lease, and (2) the right to enter security under the Act of March 25, 1825, where the lessee has waived his rights under that act. In the lower court, on the authority of the case of *Grider v. McIntyre*, 6 Phila. 112, judgment was given in favor of the sub-tenant, who had obtained a rule to open the judgment in ejectment entered upon the authority of the lease. In the Supreme Court, in the opinion of Mr. Justice Fell, it was declared that the sub-tenant had no standing as against the landlord under the circumstances of the case, unless he had acquired some right, and judgment was given accordingly for the plaintiff.

As early as the case of *Row v. Riggs*, Bos. & Pul. 330, Mansfield, C. J., declared: "I never understood that it was necessary for a landlord to give notice to anyone but his own tenant. If possession be not delivered up after said notice, the landlord may take a verdict against his own tenant and sue at execution, upon which the sheriff will turn the under-tenants out of possession." In Pennsylvania, however, the courts have occasionally looked with a kindly eye upon the rights of sub-tenants in possession, as is very fully brought out in the interesting note of Judge Arnold to the principal case.

In *Grider v. McIntyre*, *supra*, upon which the lower court relied in reaching a decision in the principal case, it appeared that upon a demand for security for the payment of the rent the original tenant surrendered the premises before the expiration of the lease, having previously sub-let them to the plaintiff for a period which had not yet expired. The sub-tenant tendered security, as required by the act, which was refused by the landlord. It was held that the original tenant could not waive any legal right to the prejudice of the sub-tenant; citing the case of *Pleasant v. Benson*, 14 E. 234, and *Brown v. Butler*, 17 Leg. Int. 148, a sub-tenant was held to have the right to protection in the exercise of his privilege under the Act of 1825, and the landlord could not complain, because his rent is secured, and the object for which the act was passed was attained, even by the act of a party who, although a stranger to the landlord, had contracted with his tenant and thus

entitled himself to legal protection as against the unauthorized acts of the original lessee. *Grider v. McIntyre* is certainly overruled by the decision of *Shermer v. Paciello*, and the profession and public should be very thankful that such an important question of landlord and tenant law has been decided in such a satisfactory manner. It had always been popularly supposed that the sub-tenant, when unrecognized, had absolutely no status as against the landlord, and real estate agents had constantly proceeded upon the basis of the doctrine enunciated in *Shermer v. Paciello*.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to William Draper Lewis, Esq., 726 Druzel Building, Philadelphia, Pa.]

- A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS IN THE UNITED STATES.** By CHRISTOPHER G. TIEDMAN. New York and Albany: Banks & Bros., 1894.
- HAND-BOOK OF CRIMINAL LAW.** By WM. L. CLARK, JR. St. Paul, Minn.: West Publishing Co., 1894.
- A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY.** By LEONARD JONES. In Two Volumes. Fifth Edition. Boston: Houghton, Mifflin & Co., 1894.
- THE LAW RELATING TO REAL ESTATE BROKERS, as decided by the American Courts.** By STEWART RAPALJE. New York: Baker, Voorhis & Co., 1893.
- DIGEST OF INSURANCE CASES, for the year ending October 31, 1893.** By JOHN FINCH. Indianapolis: The Rough Notes Co., 1893.
- THE LAW OF EXPERT TESTIMONY.** By EVAN B. LEWIS. Philadelphia: Rees, Welch & Co., 1894.
- THE RISE AND GROWTH OF ELEVATED RAILROAD LAW.** By THEODORE F. C. DEMAREST. New York: Baker, Voorhis & Co., 1894.
- THE AMERICAN CORPORATION LEGAL MANUAL.** For the use of Attorneys, Officers of Corporations, Investors and Business Men. Vol. II., 1894 (To January 1, 1894). Edited by CHARLES L. BORMEYER. Plainfield, N. J.: Honeyman & Co., 1894.
- CASES ON CONSTITUTIONAL LAW, with Notes. Part II.** By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever, 1894.
- POCKET MANUAL OF RULES OF ORDER FOR DELIBERATIVE ASSEMBLIES.** By Lieut-Colonel HENRY M. ROBERT. Chicago: S. C. Griggs & Co., 1894.
- THE ANNUAL ON THE LAW OF REAL PROPERTY.** Edited by T. E. and E. E. BALLARD. Vol. II, 1893. Crawfordsville, Ind.: The Ballard Publishing Co., 1893.
- A TREATISE ON THE LAW OF BUILDING AND BUILDINGS, especially referring to Building Contracts, Leases, Easements and Liens, containing also Various Forms Useful in Building Operations, a Glossary of Words and Terms commonly used by Builders and Artisans, and a Digest of the Leading Decisions on Building Contracts and Leases in the United States.** By A. PARLETT LLOYD. Second Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

- A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY.**
By LEONARD A. JONES. Fourth Edition. Revised and enlarged.
Boston and New York : Houghton, Mifflin & Co., 1894.
- THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA**, being a series of lectures delivered before Yale University. By JOHN F. DILLON, LL.D. Boston : Little, Brown & Co., 1894.
- AMERICAN RAILROAD AND CORPORATION REPORTS**, being a Collection of the Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago : R. B. Myers & Co., 1893.
- THE BANKING QUESTION IN THE UNITED STATES**, Report of the meeting held on January 12, 1893, under the auspices of the American Academy of Political and Social Science. Addresses by HORACE WHITE, MICHAEL D. HARTER, A. B. HENFURN, J. H. WALKER, HENRY BACON and W. L. TRENHOLM. Philadelphia : American Academy of Political and Social Science, 1894.
- THE BENCH AND BAR OF NEW HAMPSHIRE**, including Biographical Notices of Deceased Judges of the Highest Courts and Lawyers of the Province and State, and a List of Names of those now living. By CARL H. BELL. Boston and New York : Houghton, Mifflin & Company, 1894.
- THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE.**
By EDWIN R. BRYANT. Boston : Little, Brown & Co., 1894.
- REPORT OF THE TAX COMMISSION OF OHIO**, of 1893.
- AN ESSAY ON THE LAW RELATING TO TELEGRAPH COMPANIES.**
By EDWARD BROOKS, JR., of the Philadelphia Bar. Lancaster : Wickerham Printing Co., 1893.

BOOK REVIEWS.

THE POLITICAL ECONOMY OF NATURAL LAW. By HENRY WOOD. Boston: Lee & Shepard, Publishers, 1894.

It is not the function of a law magazine to review economic literature. Natural law is not a subject with which the lawyer deals, and yet, since we have taken the trouble to read this book, and since we know several members of the bar who are more or less interested in economic subjects, we desire to say that it is the worst of a very bad lot that shall be nameless. The writer seems to be imbued with one idea, and one idea only, and that is, that *natural law* must never be interfered with under any circumstances and conditions. Individual lines of action "are often inharmonious and contrary, while the operations of natural law are consistent and harmonious." What this natural law is about which Mr. Wood talked so fluently we do not know, and we have a suspicion the author does not know, either. For instance, what does he mean by this: "Its different factors may modify or counteract, but never oppose each other, for truth cannot be in opposition to truth. Its only warfare is with error, and its complete victory is simply a question of time." Or, again, what is meant by, "Natural law, being normal, is truthful;" or, of the natural law in the economic realm "as one of the many subdivisions of the universal natural law or the grand unity of truth." Shade of Sir Henry Maine! Would that that author, when he wrote the history of the ideas which, during the different stages of the world's development, have gathered around the idea of the word "natural," could have seen this curious conglomeration and mixture of ideas, which, revolving in the mind of Mr. Wood, came to light in these pages.

We speak thus harshly of this work, which we would otherwise ignore, for the following reasons: The science of political economy or economics is a noble science—as noble, perhaps,

as the science of law, and certainly requiring just as deep research, just as efficient study, and just as clear a mind. Suppose that, to-day, there should be written a work on the law of contracts, which, disregarding all the decisions of the court, all that had ever been written or said, produced a work that one who had never studied law would write, would it not then be the duty of every man who cared for the science of law to condemn that book? The book and the writer would be masquerading under a title which they had no right to. Now, this sort of thing is what we believe only happens too frequently in political economy or economics. Men entirely unfamiliar with the literature of the subject, or who have never taken the trouble to examine the facts of the actual world, write out their own ideas, or what they are pleased to call ideas, gathered with little trouble and less thought, and label the whole "Political Economy" or "Economics," or some title by which the innocent reader will be deluded into thinking that the author is a student of the subject. This we do not consider as fair. It would not be fair in law, and it is not fair in economics. It is not fair to the men who are spending their lives trying to make the economic and social laws plain. Such a book as this tends to throw ridicule around the valuable labors of others. Publishers like the ones whose names are on this work should regret that it is there.

W. D. L.

CASES OF CONSTITUTIONAL LAW. Part I. With Notes by JAMES BRADLEY THAYER. LL.D., Weld Professor of Law at Harvard University. Cambridge: Charles W. Sever, 1894.

This work is the first part of a collection of cases on Constitutional Law which have been looked forward to for some time by those of the profession interested in that subject. The high position of the writer gave promise of a valuable work, and the result, so far, more than comes up to our expectations.

Case books from the Harvard Law School have become so familiar to members of the profession, that it is almost

unnecessary to describe their character. The present collection opens with some preliminary quotations on government taken from Aristotle, Montesquieu, Holland, Blackstone, etc. The principal English decisions on prerogative of the crown are given; but the most interesting cases in the volume are those which illustrate the rise of that peculiar "American doctrine" of Constitutional Law, the power of the judiciary to declare an Act of the Legislature contrary to the Constitution void. The cases of *Rutgers v. Waddington* and *Trevett v. Weeden* will always have a lasting interest for the student of this subject. The first of these is reprinted from a pamphlet of Mr. Henry B. Dawson, published in 1866. The court did not really assert, though they implied, that they had the power to set aside a statute as being contrary to the Constitution. New York had passed an act which, in terms, would have permitted one, who, during the Revolutionary War, had had his premises occupied by foreign troops, to bring a suit in trespass against such person. The court thought that to apply the statute so as to cover such a case, after the treaty of peace between the United States and Great Britain, was to imply that the Legislature of the State of New York desired to set aside the law of nations, an implication which the court refused to make. "Whoever, then," they say, "is clearly exempted from the operation of this statute by the law of nations, this court must take it for granted, could never have been intended to be comprehended within it by the Legislature . . ." This very moderate decision seems to have aroused public feeling to such an extent that a mass meeting was held, which issued an address, parts of which read strangely to us after a hundred years of experience of State Legislatures, on the one hand, trampling on the rights of individuals, and courts of justice on the other, standing between the individual and the arbitrary action of the State. The quotation from the address runs as follows:

"From what has been said, we think that no one can doubt the meaning of the law. It remains to inquire whether a court of judicature can consistently, with our Constitution and laws, adjudge contrary to the plain and obvious meaning of a statute.

That the mayors' courts have done so in this case is manifest from the foregoing remarks. That there should be a power vested in courts of judicature, whereby they might control the supreme legislative power, we think is absurd in itself. *Such power in courts would be destructive of liberty and remove all security of property.* The design of courts of justice in our government, from the very nature of their institution, is to declare laws, not to alter them. Whenever they depart from this design of their institution, they confound legislative and judicial powers. The laws govern where a government is free, and every citizen knows what remedy the law gives him for every injury. But this cannot be the case where courts, if they deem a law unreasonable, may set it aside. Here, however plainly the law may be in his favor, he cannot be certain of redress until he has the opinion of the court." At the same time, the House of Assembly resolved, "That the judgment aforesaid is, in its tendency, subversive of all law and good order, and leads directly to anarchy and confusion; because, if a court instituted for the benefit and government of a corporation may take upon them to dispense with and act in direct violation of a plain and known law of the State, all other courts, either superior or inferior, may do the like; and therewith will end all our dear bought rights and privileges, and legislatures become useless."

In the report of *Trevett v. Weeden*, we regret that the argument of Mr. Varum was omitted. Mr. Varum's speech would have added a great deal to the value of the report of the case, as it places in extenso the reasons on which the judges probably reached their decision. There is no opinion of the court, but Prof. THAYER has printed the reply of the judges to the General Assembly when they were summoned before them to explain why they had declared an act of the Assembly void.

In this part of the work Prof. THAYER has used freely the material collected by the late BRINTON COXE, Esq., of Philadelphia, and printed in his posthumous work on "Judicial Power and Unconstitutional Legislation," which we had such pleasure in reviewing at length on page 76 of the current

volume of the *AMERICAN LAW REGISTER AND REVIEW*. Some of the most interesting parts of Mr. COXE's work are thus preserved with full permission of Mr. COXE's editor, WILLIAM M. MEIGS, Esq., in a place where they will be apt to reach a larger class of readers. There are few more interesting things in the whole work, than the report of the case which came before the Hanscatic Court of Upper Appeal at Lubeck, in which that court decided that even when constitutional provisions do not exist, prohibiting an official attesting, the legal validity of ordinances of the sovereign, which have not been authenticated in due form, the judge has, according to general legal principles, both the authority and the duty of refusing to apply an ordinance of the sovereign which, while its provisions are those of a law, has not been enacted according to the forms prescribed for making law by the Constitution of the land. This decision has since been overruled, but it is interesting as the only modern example of a civil law court attempting to hold the government to the provisions of a written Constitution. On page 149 to 154 inclusive and in other parts of the work the author has reprinted the major portions of his article in the *Harvard Law Review* on the "Origin and Scope of the American Doctrine of Constitutional Law."

The report of the case of *Fletcher v. Peck*, as an illustration of the power of the courts to set aside unconstitutional legislation, leads us to mention one apparent difficulty in this system of reporting cases illustrative of the different branches of a subject. *Fletcher v. Peck*, while it is an excellent illustration of how the courts of the United States can declare an act of the State contrary to the Federal Constitution void, has its chief importance not in that fact, but in the fact that it is a case where the Supreme Court first declared that a grant of land was a contract which the State could not impair. The decision in this last respect was fraught with consequences which are still being worked out. It is a matter of speculation, for instance, whether the Dartmouth College Case would have been placed upon the ground that the Act altering the charter violated a contract, and not on the ground that it confiscated property, had the opinion in *Fletcher v. Peck* never

been written. And it is an interesting query whether had the court considered the Act of New Hampshire in that case nothing more than the confiscation of property, whether they would have affirmed the decision of the State Court, or held that an *ex post facto* law could apply to a civil as well as to a criminal case. However this may be, it will be interesting to see what Prof. Thayer will do when he comes to publish cases illustrative of that clause in the Constitution which prohibits a State from passing laws impairing the obligation of contracts. Well, he will omit *Fletcher v. Peck*?

In a subject like Constitutional Law the same case may be of great importance, not only in one, but in two or more branches of the subject. Space prohibits that the cases should be republished in every connection. References to a case which was important in one connection, which had been reported in another, might be valuable, but the report of the case having been written from the standpoint that the case is to illustrate the development of a particular principle of law, the report naturally brings out the parts of the case and the parts of the opinion dealing with that principle, and, therefore, the report may not be suited as an illustration of the development of other principles. Prof. Thayer has prepared himself for getting around this difficulty by printing the opinion of the court in such cases as *Fletcher v. Peck*, in full. Why, however, he omitted the opinion of Mr. Justice Johnson, in that case, we do not know. Will not that opinion be important when he comes to discuss the meaning of *ex post facto* laws, or whether a law can be declared void because against the spirit of the Constitution? In fact, we note that all the cases on the subject of the power of the court to set aside acts for their unconstitutionality seems to omit those opinions, like Mr. Justice Johnson in *Fletcher v. Peck*, which would set aside the Act of the Legislature, not because it was contrary to any express clause in the written Constitution, but because it was not to be presumed that the Legislature had been granted power to pass such Acts. For instance, the case of *Trustee of the University v. Foy*, and the opinion of Mr. Justice Chase in *Calder v. Bull* has been entirely omitted. It is true that the ideas rep-

resented in these cases, and in the opinion of Mr. Justice Johnson did not at the time develop into principles of Constitutional Law, but to-day such members of the Supreme Court as Mr. Justice Brewer are reverting to the ideas of Chase and Johnson and Mr. Haywood, counsel, in the case of the Trustees of the University *v.* Foy above mentioned, and basing their opinions on Constitutional matters on lines of reasoning suggested by these old cases and opinions. (See AMERICAN LAW REGISTER AND REVIEW, Vol. 32, 971).

Even peculiar doctrines of constitutional law, though never again taken up by the members of the profession and of the present Supreme Court, are sometimes interesting and instructive. We presume, however, that to insert all the ideas on Constitutional Law, as well as those which come to naught, as those which developed and became imbedded as part of the fundamental principles of the subject, would have unduly increased the size of the work.

The volume before us is the first instalment of what is evidently a work of permanent value, to which will turn all students of Constitutional Law, as well those students of twenty-five years hence, as those of to-day. If the remaining parts of this work attain, as they doubtless will, the high standard of the first part, the profession will owe another debt of gratitude to the University in Massachusetts.

W. D. L.

A TREATISE ON THE LAW OF PARTNERSHIP. By THEOPHILUS PARSONS, LL.D. Fourth Edition. Revised and Enlarged JOSEPH HENRY BEALE, Jr. Boston: Little, Brown & Co., 1893.

It has been fifteen years since the third edition of Professor PARSON'S work made its appearance. It is to Mr. BEALE (Assistant Professor of Law at Harvard) that we owe the present revision and enlargement of the "Partnership." The Editor has done his work well. In the first place, he has added a chapter upon a subject which has seen much develop-

ment and undergone important changes since the previous publication of the work—that of business combinations and “trusts.” The question is treated very clearly, though briefly, finding a place in the work from its relation to partnership law rather than for the purpose of discussing its depths, interesting and important though they undoubtedly are. This chapter first describes a few of the present more important “trusts,” and shows the objects of their custom and their nature legally considered. The question of illegality is then taken up, and, as regards the cases to which corporations are parties, a distinction drawn between the violation of, or departure from, charter rights, and the more interesting and less well-defined ground of “public policy.” A list of the various State “anti-trust” acts is added in a note and a brief mention of the extent to which they have gone.

The editor remarks in his preface that “much of the discussion in the first and fifth chapters” (of the previous edition) “was rendered unnecessary by *Cox v. Hickman*.” The mercantile conception has, he says, become the legal conception as well. On page 41, chap. 5, the partnership character is discussed.

Mr. Beale has not hesitated to make liberal use of his office as regards the treatment of the notes. We find, however, that the changes are improvements, and such is surely the province of the editor.

A useful appendix of forms for partnership agreements (and disagreements) is added. The book has throughout been divided into sections, following the present almost universal custom. Text books are usually consulted, not read continuously, and some sort of heading to the various subjects are necessary.

W. S. E.

The Editors announce that the following *erratum* has been brought to their attention: Page 69, 2d column, 4th line of the January number, 1894 (Vol. I, N. S., No. 1), after the words “upon the discretion of a last trustee,” insert “or being given in perpetuity.”

THE
AMERICAN LAW REGISTER
AND
REVIEW.

JUNE, 1894.

THE COMMERCIAL BASIS FOR RAILWAY
RECEIVERSHIPS.

By THOMAS L. GREENE.

During the year 1893 there were placed in the hands of receivers 76 railway companies, small and large, owning 29,380 miles of line and representing stocks and bonds to the amount of \$1,754,806,000, being one-sixth of the railway mileage and one-sixth of the railway capital of the country. These figures of capitalization do not include car trust notes, floating debts or other liabilities, which would add considerably to the total. At present about one-fourth of the entire railway mileage of the country is being operated by these officers of the courts.

These large figures suggest at once the importance which the question of railway receiverships has assumed of late through the inability of railway companies to meet their obligations. The practice of operating insolvent railways through court officers appointed for the purpose is not yet definitely settled either as to the methods of working or as to the legal doctrines involved, the whole matter being yet in a state of evolution. It is the boast of our law that it changes to meet the changing demands of commerce, as business becomes more complex and the rules governing it necessarily more

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involved; so as regards railway receiverships our present situation is the result of a compromise between the terms of railway mortgages and the commercial conditions under which railway operations are carried on.

The original idea of appointing a receiver to take charge of the property of a firm or individual was that the business might be wound up with as little delay as possible and the assets sold and distributed to the creditors in some equitable proportion. As corporations became more common, taking the place of firms and individuals, the same idea was applied to them when insolvent. They were placed in the hands of receivers in order that their affairs might be closed up with the least possible delay by dividing the assets among the creditors in the proportion to which it was shown they were entitled. It was inevitable that the question of the proper method of treating insolvency among railway companies should arise. From small beginnings the number of miles of railway in the United States increased rapidly until now, judged by the magnitude of the property invested and the amount of business done, the railways form perhaps our largest industry, certainly one of the most complex. Through one cause or another it was inevitable that bankruptcy should increase among these rail carriers as their mileage increased; and in such cases also it was natural, as in the cases of firms or small corporations, that receivers should be appointed pending a settlement of the insolvent debtor's affairs. But here a new question arose. A trading firm or corporation unable to pay its debts could be wound up and its assets distributed to its creditors without loss to the community. Other traders could take their places and business would go on as before; but it was otherwise with the railways. It was quickly seen that great states and sections of states dependent upon the continued operation of these railways for the transaction of their every day business, for supplies of clothing and manufactured goods and even for meat and bread. Whatever the outcome the trains must be kept running. Since, in the course of time, local railways had grown into systems, it was found that the interests involved in these systems were so enormous that their combined assets

could not easily be sold as one parcel to any one person or company, or sold separately without breaking up the systems. Hence, until the serious questions of reorganization or sale were settled, the receivers of these systems must continue to run the trains in the interest of the public. As these necessary adjustments were often found very complicated, requiring a long time for negotiations and final agreement, the receivers appointed by the courts were placed for the time being in the position of railway managers. They were confronted with technical problems of much practical importance. They were required to become familiar with disputed questions concerning reasonable rates and their ramifications. The conflicting claims of cities and towns as to charges which should be relatively fair to each were pressed upon their attention. In short, it was required that receivers should be able to formulate for the operation of the properties in their charge a policy which should be equitable to the capitalists whose money was invested in the road, to all the sections served by the railway and to the general traveling and shipping public. Needless to say the success of such a task required men of administrative ability with the further result that the courts through their appointed officers were obliged to decide upon the details of administration.

It was the practice at first for receivers to be asked for solely by the creditors of the company in order that their property might be held together and protected against the seizure of certain parts of the system, particularly against creditors who might destroy the value of the property as a whole. Usually the corporation appeared before the court in opposition to the motion so that, if receivers were appointed at all, the court acted upon information brought to its knowledge after a severe legal struggle. The idea that the corporation itself could ask for an appointment of a receiver for its own property originated with the late Jay Gould, whose contention in the Wabash cases in this respect was afterwards affirmed by the Supreme Court of the United States, which held that a company could itself ask for the protection of the court if such was for the best interest of all concerned. Under this

doctrine few of our large railway systems are now placed in any but "friendly" hands. In such cases the matter is all planned out beforehand and the men chosen. Any creditor of the company, friendly to the administration, may allege that the corporation owes him money that it cannot pay, and as every going concern has plenty of creditors in the ordinary course of business, such a convenient creditor is usually not hard to find. To this complaint, usually prepared in secret, some one of the company's officers arranges a reply confessing the truth of the charge. All parties concerned, each with the respective documents, and without notice to the other creditors or to the public, apply to the judge, perhaps at night, who forthwith grants the application and appoints the receivers already arranged for. That this procedure opens the door to the possibility of great abuse of corporate interests needs no argument. That on the whole the plan has worked fairly well is owing to the high character of our judiciary and also of the officers in charge of our great corporations. Yet it is not reassuring to holders of stocks, bonds or floating debt to know that a conspiracy between any small creditor and any one of the principal officers of a corporation may throw the control of the whole property of the company into the hands of the court. Unquestionably, the appointment of former officers of the company as receivers leads to the charge at times that those who had wrecked the company are still left in power. Moreover, the door is open to abuses such as the difficulty easily thrown in the way of a thorough investigation into the company's condition, which it may be the wish of the old managers to thwart, but which may be necessary before an equitable plan of reorganization can be envolved. Yet the affairs of our large corporations have become so complicated that only those long familiar with them are capable of administering them without losses both to owners of the road and to shippers. This business fact has so far controlled the action of the courts in the appointing of old officers of the insolvent corporation as receivers, though usually other men not previously connected with the company, but representing important interests as well as the sections through which the

If the decline continues and a receivership ensues, the passing of the property into the hands of the court is an acknowledgment of facts regarding impairment of income which are true though not before generally known. Hence the issue of receivers' certificates commercially represents the impairment of income just referred to, but which at the time was not enforced against the bondholders. Railway mortgages are not sacred because of the strong legal terms in which they are drawn, but are dependent upon success in the business of transportation, differing in this respect from real estate mortgages which rely more upon the prosperity of the whole community. The legal doctrine of certificates is in a state of evolution, with a tendency to approximate its working to the business circumstances. English debentures are not foreclosable, being mortgages upon the railway income only, and thus more truly than American mortgages, represent the real situation. Our practice of railway receiverships is thus a development of our own circumstances and a sort of compromise between the too-strong language of our mortgages and the actual conditions of the business of transportation.

A receiver may decline to pay the rentals due to leased lines or the interest owing on guaranteed bonds if these lines are at the time of the receivership unprofitable, no matter how necessary to the parent company these branches may once have been. But the old contracts are still legally in force against the company, and can be thrown off only by a sale of the franchise and property to a new corporation. Such a sale sometimes would involve a forfeiture of valuable charter rights; and in such reorganizations committees usually try to formulate some plan which shall bring the fixed charges below the minimum profits by allotting the necessary losses among all classes of securities in proportion to their respective values to the system as a whole; a process which does not regard the liens of the mortgages so much as the worth of the lines they cover. But with plans of reorganization, the receiver properly should have nothing to do.

JOHN MARSHALL

BY CHESTER N. FARR, JR.

It is the tenth of June, 1788. We are standing in the gallery of the old Richmond Theatre on Shockoe Hill. The heart of a nation newly born is throbbing feebly, as if struggling for life, in the gathering on the floor below; for it is the ninth day of the session of the Virginia Convention called to ratify or reject our present Constitution of the United States. Around us in the galleries are clustered the fashion, beauty, wealth and intellect of Richmond; nay, from every walk of life, people have left their employments or their pleasures that they may appear at this stirring crisis. Outside through the windows we look at the city stretched out before us, and tinted in the rays of the summer sun of the South. And as the hushed crowd in the auditorium lean forward to catch the speaker's words, with a stillness so profound that the flutter of fans has ceased, the very airs outside have paused in their sportive whirls, and not a twig or leaf rustles. A single beam of the noontide sun, piercing the atmosphere, throws a glittering halo about the head of a figure standing in the rostrum, upon whom all eyes are fixed. A tall, slender, ungainly figure, dressed plainly in a somewhat ill-fitting surtout of blue, is speaking from this place. The clear-cut, impressive features, not handsome, but striking and bronzed with the sun, are upturned to meet the light as if he welcomed this heaven-sent omen of success to the cause for which he is contending.

The black eyes flash with a singular lustre, and the dry, hard voice, drawling and hesitating somewhat at first now speaks with a force as resistless as the thought it conveys, while a single, awkward gesture, a perpendicular sweep of the right arm, cuts the air at intervals.

"John Marshall, the young delegate from Henrico county,"

is whispered near us, and we hear the speaker's voice as he gives utterance to his closing passage.

"The honorable gentleman has told you that your Continental Government will call forth the virtue and talents of America. This being the case, will they encroach upon the power of the State governments? Will our most virtuous and able citizens wantonly attempt to destroy the liberty of the people? Will the most virtuous act the most wickedly? I differ in opinion from the worthy gentleman. I think the virtue and talents of the members of the general government will tend to the security instead of the destruction of our liberty. I think that the power of direct taxation is essential to the existence of the general government, and that it is safe to grant it. If this power be not necessary, and as free from abuse as any delegated power can possibly be, then I say that the plan before you is unnecessary, since it imports not what system we have, unless it have the power of protecting us in time of peace and war."

A hush, a burst of applause, and the orator has taken his seat.

These are the first public statements of John Marshall on the Constitution of the United States. They but foreshadow the great labors which he afterwards performed upon it. As a soldier he had borne arms in defence of the country of its adoption; as a legislator he had contended for its ratification; as a diplomat he was to fling back with dignified scorn the insults levelled at it by the Empire of France, and finally, at the summit of his professional glory, as Chief Justice of the Supreme Court of the United States for thirty-four years, he built up, perfected and expounded this same Constitution through a series of decisions unparalleled in the annals of jurisprudence.

We are burning now, in our peace, our happiness, our prosperity and our liberty, the stored sunshine of the intellects who nourished our republic in its inception. Their powers were at work, perfecting secret forces, to act not for a day, a decade, but for all posterity. Not to patch a piece of mechanism that it might deal a few stirring strokes and then im-

tently fail, nor to flash out a shower of the glittering sparks of political pyrotechnics leaving the surroundings in intenser darkness when their glow had expired. They worked slowly but they worked truly. They fashioned despite popular clamor and opprobrium. Doubtless they saw in the distance the Promised Lands which their work would develop and perfect, whose waters they might not taste and whose air they might not breathe, and yet they faltered not. And among these men to none do we owe a greater debt, and to none has less of that debt been paid than to John Marshall.

The mistaken notion that much of the value of Marshall's services is a merely technical value has led the popular mind to place him in that category of vague personalities whom we praise with the pleasing indefiniteness born of ignorance of the work which he has accomplished. And yet a theoretical exposition of a national government, crude of necessity, discussed under his hands, became a complete and rounded whole. Statements so general as those contained in the Constitution of the United States, are necessarily susceptible of a varied construction. To define all these, to limit their maximum and minimum effect, in practical application was the work performed by Marshall. The Constitution, a shadowy vision of political theories, grand, indeed, to behold, but intangible and elusive, became under his hands, a living breathing entity.

In the mentality which availed to perform this work, we have a mind that in its peculiar field has not been paralleled in the history of this country. "Aim," said Marshall, "exclusively at strength." He did not wish to obscure by rhetoric or retard by descensive bursts of eloquence the attainment of the object he had in view. He felt that the field in which he labored was one that could not be cultivated by a display of the mental graces, but only by the sturdier qualities of sinewy reasoning. Nor was the faculty which destroys but does not create, which uproots the weeds, mayhap, but leaves behind a barren and sterile field, a faculty which dominated the mind of Marshall. He would not attempt to raze an unsightly building to the ground, unless he was prepared to

remove the ruins or erect in its stead some worthier structure. The impassioned denunciations uttered by Henry against the Constitution that "squints horribly," that "squinted towards monarchy," and the attempts of the latter and the Jeffersonian anti-Federalists to fetter the Federal Government, and to clip its claws, Marshall met with the weapons of weighty logic so thoroughly at his command. Upon the power of these weapons his contemporaries looked with an admiration universally expressed, and admixed with fear when they faced them. Said Daniel Webster, "when the Chief Justice says, 'it is admitted,' I am prepared, for a bomb that will demolish all my points."

This close, remorseless logic was pitted against qualities which appeal to the passions and not the reason of men, and these qualities the best of their time, again and again, and it never failed. The fervid eloquence of Henry, the rich imagination of Wirt, and the graceful and pleasing oratory of Campbell all fell before the overwhelming logic of Marshall. And we must remember that this logic had the incumbrances of an ungraceful delivery and an ungainly figure, and that the triumphs were achieved under circumstances in which the passions of men were most easily moved and their judgments most readily swayed by the tumult of their emotions. Strong, indeed, must have been that power of reasoning, which, under conditions so adverse, could have proved an invariable victor. And as we examine it we are struck with its exceptional clearness.

Indeed, the acts or thoughts of genius are essentially clear and simple. Complications may be readily devised by the baser ability of cold talent. But the formulæ conveying ideas which found empires or establish systems of social or economic polity, have no distortion or opacity. So simple are these thoughts that when revealed to us they startle us with their self-evident truth, and half incline us to believe that we have always been aware of their existence. No laws are so simple as those governing the apparently complex workings of nature, no formulæ so easy of comprehension as those which express them. A simple system, expressed in a single

sentence, enabled Napoleon to revolutionize military tactics, a simple process of reasoning sufficed for Bacon to supplant a species of logic that had stood for centuries, and a simple experiment in physics, gave Watts the means to open the way for a new era in the development of motive power.

The tools of a jurist, rightly applied, can suffice to mould and perfect a nation's existence and prosperity. And Marshall's logic is so clear, so convincing, and so transparent, and every point evolved follows so naturally upon its antecedent, that we feel ourselves forced to guard against the conviction almost thrust upon us, that these are trite truths, which we have known before. Yes, they are trite truths, they have existed through an eternity. They are as common as diamonds in the bowels of the earth, but who shall dig for them; they are as plentiful as pearls in the depths of the sea, but who shall dive for them. The system of constitutional jurisprudence which Marshall built is simple as its logic is convincing. Plain and unadorned, it does not need the tawdry frippery of ingenious sophistry, or the deceptive adornments of obscure learning to hide its defects, it stands naked and bare, showing best like the colossal statue of Phidias, in its majestic outline, when new elements of strength and beauty are revealed by the searching light of truth.

And yet much further than this did Marshall's mental circle extend. To convince, to explain, to amplify is one thing, to apply another. Marshall was not a purveyor of abstract truths alone. He was forced in his position to apply those truths to the practical workings of actual facts and figures. He was not only compelled to put the machinery in working order, to supply defects in mechanism, and institute additions and improvements, but to manipulate it himself. The combination of qualities required for this purpose is a rare one. Unless we clearly see them as concentrated in Marshall we see only half of his ability. Many minds gifted with the finest powers of abstract reasoning have failed in the concrete application of the principles which they have evolved. Marshall was obliged to build from the foundation up. That he did not complete the edifice is due solely to the shortness of man's

existence. He left plans and suggestions sufficient for the instruction of those who followed, and the work has been developed almost uniformly on the lines which he has laid down. He introduced the Constitution to the people. He made them familiar with it as a working principle, not as a governmental theory. It ceased to be an unreal being, which they feared to touch, lest the touch be harmful, or a supernatural object to be regarded with mysterious reverence or calm indifference. In truth, to effect this, it were well for one to aim exclusively at strength. Life is too short to permit time to be wasted in adornment. The crisis is critical, let us devote our best energies to its solution. So Marshall reasoned, and the rich heritage of this reasoning is transmitted to us. But there is another view to be considered. As we read the book of this man's character let us not leave those pages uncut which reveal the private spaces in the inner temple where purity is brightly burning or vice rotting to decay.

We love instinctively to see a great man in dressing-gown and slippers. We care more for Frederick the Great when we know he scrawled bad verses, for Lord Tennyson when we see him wreathed in the smoke of his church warden; for Thackeray when he sniffs a bowl of steaming punch, or for Warren Hastings when we hear he cultivated tulips. They cease then to be demi-gods, they become men, we can take them by the hand, we can walk at their side. For we can discuss tulips with Hastings, and we are familiar with good punch; we smoke, and, perchance, we too have written execrable poems. Too often do we tremble to divide those uncut leaves lest we discover that the idol we cherished has feet of clay. But the leaves in Marshall's book we can cut boldly, nay, more than that, with the happy expectancy that the record of those pages will not fill us with distant admiration nor cold respect, but with hearty and healthful love.

There was an atmosphere in this man's presence, a tone in his voice, a sparkle in his eye that warmed even the cynic heart with the glow of affection. I am tempted to compare the effect of contact with Marshall to that sacred feeling of having touched purity and truth, which we experience after

a merry romp with a little child or after its caress—like a breath from the valleys of Paradise, at which the faint heart revives, and the sorrowful cease from sighing.

The character of Marshall was distinguished by an almost childish simplicity—not the politic affectation of simplicity presented us by Jefferson, which has been embalmed in tradition and which existed merely in outward show, but a simplicity of mind and a simplicity of heart. No fulsome airs of superior patronage nor show of gaudy learning marred Marshall's manner or conversation. Confident in his ability, he did not need its continued display to assure him or others of its existence, yet so modest withal in the sense of certain deficiencies that in view of these he hesitatingly transferred to others subjects which he deemed himself incompetent to treat; as in the resumé of authorities so often and so gracefully left "to my brother Story." He did not desire as those whose hearts are tender and lovable never do; the respectful whisper, or the flattering bow, to meet him was to meet as man to man, with cheery laugh, and hearty handsake that marked the equality and drove mental distinctions to the winds. Never fear to try his temper, continued success had not made him despotic in its exercise, for its patient sweetness was never disturbed whether he sat on the bench wearied by a prosy argument or reclined in his easy chair and suffered the tiresome talker to infest his fireside.

His good nature never failed. It seemed in this phase of his character as if he had drunk of the Fountain of Perpetual Boyhood, and when, as an old man, he staggers into the ring of jolly pleasure seekers in a woodland party, and dropping an armful of flat stones to the ground, challenges with his bright smile the sturdiest of the youths to a game of quoits, this same boyishness shines forth and lends its subtle charms to the veneration which his grey hairs command. These springtide odors in the winter of life are borne on breezes that seem to waft us one length nearer heaven. All that is good and true and beautiful is of their essence, and he who, like Marshall, radiates from his presence their grateful glow, leaves a private debt that is recorded in letters of gold on the pages

of the books of the celestial city, no matter how negligently forgotten on this forgetful earth.

Alas! for those who give to others all their affection! When the ties are broken the struggle is indeed hard, and when we see this venerable head bearing its seventy-five years, bowed over his writing at his desk and shedding passionate tears over the memory of the wife who had been his constant companion during his busy life, we feel the wealth of affection he had bestowed, and the depth of feeling of which his spirit was capable. Yet to Marshall was given a great consolation too often denied to those whose days have long outlived their generation. As the charred brand that lies on the hearth, and with blue smoke curling feebly upward seems to offer a mute appeal for its separation from its fellows so brightly blazing in the glowing grate. So the last days of those cursed with a too great longevity, are too frequently passed in silence and seclusion the former companions dead, the former faculties fast fading, and the world with its burning issues of the bright present leaving them further and further behind.

No so with Marshall, a generation expired, but he was abreast of the next, his surroundings changed but his work was of that character that built far into the future, and each year of life, but assured him the stronger of its complete fulfillment. He worked to the last, no decline of mental vigor, no symptoms of approaching decay, and when fourscore well spent years had passed away, his dust was gathered to mingle with the other illustrious dead in the soil of that country whose prosperity he had so nobly enhanced, and of the State whose name he had so highly adorned, and the great bell that "proclaimed liberty throughout the land," as if conscious that, in this man's death, its work was done, cracked its iron heart in the strokes that tolled his funeral knell.

Contemporaries are but too apt to undervalue master minds. "De Mortuis" is not necessarily a cynical aphorism, but the result of the calm judgment of retrospection. Many that have labored through a toilsome life to build their immortality have reaped its rewards only in death. Often at the close of a hot summer's day we turn our eyes toward the sun as he sinks

behind the hills in his fiery splendor, with his bright beams lying athwart the landscape and flashing upward like the golden lances of a serried square, and in this most noble of spectacles, forgetting the oppressive burden and heat with which we had reviled his disc at noonday, we gaze half regretfully at his expiring glories. Something of a prayer breathed that we may atone on the morrow for this day's ingratitude to the great life-giver; a morrow that too often we may not see. And thus when the heat of party strife and faction has passed away, the people hasten to the death bed of a masterful intellect too late, indeed, to accord an earthly satisfaction to a soul now freed from worldly trammels, but yet to breathe their prayers of atonement and their wishes for another life that can never come. The pomp and pageantry of a solemn funeral, the glowing tribute of eloquent eulogies, the sculptor's chisel and the painter's brush may all be invoked as a sacrifice in propitiation, and as a symbol branded deep in history, of past neglect, of ingratitude when living.

The true greatness of Marshall could not be appreciated during his lifetime, only the eye that could scan futurity could behold the fruition of his work. Only the eye trained to prophetic vision could have seen each constitutional fibre of our National Government knit tighter together with each succeeding year, or perceive how each plank in the ship of State fashioned by his hand, would cling closer to its fellow, only seasoned and hardened by use, until a government based on political liberty should float through the mightiest surges of time, scathless, enduring, a model for posterity.

And even the glory accorded the dead, has not yet been given in its proper fulness to Marshall. His name stands with thousands of people as a name and nothing more. He yet needs a memorial, other than that which he himself has wrought, not carved in perishable marble or limned in fading color, nor made of the breath of oratorical vamping, but sketched in living words, a biography, written by a master hand, and woven in the undecaying fabric of the English tongue.

NOTE.—The above address was delivered by Chester N. Farr, Jr., of the Philadelphia Bar, at the recent Commencement of the University of Pennsylvania.

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FISHER v. FISHER.¹ APPELLATE COURT OF INDIANA.*Dealing in Futures—Delivery—Validity of Contract—Evidence.*

When there is evidence that the defendant and his cousin bought a quantity of wheat through reputable members of the Chicago Board of Trade, which was delivered to them in the form of warehouse receipts; that actual delivery on demand was intended by all parties, and that they could have got the wheat on demand; that they carried it a while on margin with said dealers; that wheat depreciated, and they closed out at a loss, which was all paid by the cousin, defendant giving him the note in suit in settlement of his share—in view of these facts a finding that the note was not founded on a gambling consideration will not be reversed.

FUTURES.

No gambling device has ever afforded the votaries of fortune such opportunities or such incentives as the invention of "future" contracts; and at no time in the history of the world has gambling been carried to such ruinous excess. The tales of old-world extravagance and of ante-bellum recklessness fade into obscurity beside the millions that are staked on a single deal in wheat or corn; and no mania for cards could ever have wrought the widespread loss and suffering due to the cold-blooded manipulations of a Gould or of a Fisk. But the effects of such dealings belong to the domain of economic science; the law is only concerned with their validity.

The forms of these contracts are as numerous as the condi-

¹ Reported in 36 N. E. Rep. 296.

tions of human affairs; and their variety is bewildering to any one not to the manner born—or at least bred. Starting with a simple "option" (to buy or to sell) we are soon introduced into a labyrinth of "puts" and "calls," sales "short" and "long," and the like, until we reach the highest development of the stock gambler's inventive genius in the famous "straddle," that marvelous machine designed to rescue the unhappy operator from being impaled on either horn of a dilemma—though having a peculiar tendency to transfix him with both. But whatever the name, and whatever the outward form, a "future" contract means substantially a contract to buy or to sell, or to deliver or to receive commodities at some future time.

I. A contract to buy or to sell goods, the execution of which is postponed to some future time, is not necessarily invalid, even though the goods are not in the possession of the vendor, nor has he contracted to procure them from another, nor has any reasonable expectation of becoming possessed of them by the time appointed, otherwise than by purchasing them after the contract is made: *Hibblewhite v. McMorine*, 5 M. & W. 462; *Ashton v. Dakin*, 4 H. & N. 867; *Bartlett v. Smith*, 13 Fed. Rep. 263; *White v. Barber*, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221; *Bibb v. Allen*, 149 U. S. 481; S. C., 13 Sup. Ct. Rep. 950; *Wolcott v. Heath*, 78 Ill. 433; *Pixley v. Boynton*, 79 Ill. 351; *Logan v. Brown*, 81 Ill. 415; *Cole v. Milmine*, 88 Ill. 349; *Appleman v. Fisher*, 34 Md. 540; *Williams v. Tiedemann*, 6 Mo. App. 269; *Cassard v. Hinman*, 1 Bosw. (N. Y.) 207; *Tyler v. Barrows*, 6 Robt. (N. Y.) 104; *Kingsbury v. Kirwin*, 43 N. Y. Super. Ct. 451; *Kahn v. Walton*, 46 Ohio St. 195; S. C., 20 N. E. Rep. 203; *Brua's App.*, 55 Pa. 294; *Smith v. Bouvier*, 70 Pa. 325. Nor is a future sale, with the privilege reserved on either side to execute the contract or not, necessarily an illegal contract. "The vendee of goods may expect to produce or acquire them in time for a future delivery, and while wishing to make a market for them, is unwilling to enter into an absolute obligation to deliver, and therefore bargains for an option which, while it relieves him from liability, assures

him of a sale, in case he is able to deliver, and the purchaser may in the same way guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods. There is no inherent vice in such a contract:" *Bigelow v. Benedict*, 70 N. Y. 202; S. C., 26 Am. Rep. 573; *Brown v. Hall*, 5 Lans. (N. Y.) 177; *Perryman v. Wolfe*, 93 Ala. 290; S. C., 9 So. Rep. 148; *Kirkpatrick v. Bonsall*, 72 Pa. 155; *Maxton v. Gheen*, 75 Pa. 166. It makes no difference that the transaction is a speculative one: *Stewart v. Parnell*, 147 Pa., 523; S. C., 29 W. N. C. 537; 33 Atl. Rep. 838. If the intention of the parties is to execute the contract, in case the option is exercised, by an actual delivery and receipt of the subject matter, the contract is valid: *Sondheim v. Gilbert*, 117 Ind. 71; *Rumsey v. Berry*, 65 Me. 370; *Farnum v. Pitcher*, 151 Mass. 470; S. C., 24 N. E. Rep. 590; *Jones v. Shale*, 34 Mo. App. 302; *Noyes v. Spaulding*, 27 Vt. 420. The delivery need not be manual; it may be symbolical, by means of warehouse receipts, bills of lading, or the like: *Fisher v. Fisher* (Ind.), the principal case, 36 N. E. Rep. 296; *Farnum v. Pitcher*, *supra*; *Gregory v. Wendell*, 39 Mich. 337.

II. If, however, there is no actual delivery intended, but the transaction is to be settled by the payment of the difference between the market price and that fixed by the contract, this amounts in legal effect to a mere wager on the price of the goods, and the contract is accordingly held void, at common law, as well as by statute in many States. "Such contracts are against public policy, because they tend to unsettle the natural course of trade, and tempt the parties to them to work for a rise or fall in the prices of the commodities on which their wagers are laid, without regard to actual values, and by methods calculated to promote their own profit at the expense or ruin of others, without reciprocity of benefit. And, besides these evils, there are others, more immediate to the parties, culminating from time to time in loss of fortune and character, defalcations, crime and domestic misery, evils which, though they do not always follow, yet follow so often that they have not been overlooked by the courts:" *Flagg v. Gilpin*, 17 R. I. 10; S. C., 19 Atl. Rep. 1084; *Grizewood v. Blane*, 11 C. B. 525;

Barry v. Croskey, 2 J. & S. 1; Bartlett v. Smith, 13 Fed. Rep. 263; Embrey v. Jamison, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; Cobb v. Prell, 16 Cent. L. J. 453; Justh v. Holliday, 17 Cent. L. J. 56; Lee v. Boyd, 86 Ala. 283; S. C., 5 So. Rep. 489; Pickering v. Cease, 79 Ill. 328; Cothran v. Ellis, 125 Ill. 496; S. C., 16 N. E. Rep. 646; Watte v. Costello, 40 Ill. App. 30; Beadles v. McElrath, 85 Ky. 230; Rumsey v. Berry, 65 Me. 575; Gregory v. Wendell, 39 Mich. 337; Waterman v. Buckland, 1 Mo. App. 45; Cockrell v. Thompson, 85 Mo. 510; Rudolf v. Winters, 7 Neb. 125; Yerkes v. Salomon, 11 Hun. (N. Y.) 471; Peck v. Doran, 46 Hun. (N. Y.) 454; Story v. Salomon, 71 N. Y. 420; Williams v. Carr, 80 N. C. 294; Lester v. Buel (Ohio), 30 N. E. Rep. 821; Brua's App., 55 Pa. 294; North v. Phillips, 89 Pa. 250; Oliphant v. Markham, 79 Tex. 543; S. C., 15 S. W. Rep. 569; Everingham v. Mcighan, 55 Wis. 354; S. C., 13 N. W. Rep. 269; Lowry v. Dillman, 59 Wis. 197.

A future contract is not illegal, however, merely because it is in fact settled by the payment of differences. It is the original intent of the parties that governs; and if that be for a *bona fide* execution of the contract by delivery, even though contemplating the possibility of a settlement by way of adjusting differences, the contract is valid in its inception, and either party may waive his right to actual execution, and make a settlement on the basis of differences in price, which will not render the contract void: Clarke v. Foss, 7 Biss. C. Ct. 540; Boyd v. Hanson, 41 Fed. Rep. 174; Univ. Stock Exch. v. Stevens, 66 L. T. N. S. 612. The existence of the illegal intent is not necessarily to be inferred from the final settlement: [though it would seem to be a strong indication of it]: Ware v. Jordan, 25 Ill. App. 534; see Porter v. Viets, 1 Biss. C. Ct. 177.

Similarly, the fact that the transaction was carried on through a broker, by means of margins furnished him to secure him against any loss which he might suffer on his principal's account, is not an infallible sign of a wagering contract. The intent to deliver may exist in such a case, and the margin may be demanded only as an earnest to secure the delivery of

the goods, or the payment of the purchase price: *Preston v. R. R.*, 36 Fed. Rep. 54; *Union Nat'l Bk. v. Car.*, 16 Cent. L. J. 320; *Fisher v. Fisher*, 113 Ind. 474; S. C., 15 N. E. Rep. 832.

III. In order to invalidate a future contract, the illegal intent must be mutual: *Connor v. Heman*, 44 Mo. App. 346. If either party intends a *bona fide* execution, the contract is good as to him, and will be enforced at his suit. The secret intention of the other party cannot affect his rights: *Clarke v. Foss*, 7 Biss. C. Ct. 540; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Bangs v. Hornick*, 30 Fed. Rep. 97; *Lehman v. Feld*, 37 Fed. Rep. 852; *Edwards v. Hocffinghoff*, 38 Fed. Rep. 635; *Boyd v. Hanson*, 41 Fed. Rep. 174; *Pixley v. Boynton*, 79 Ill. 351; *Carroll v. Holmes*, 24 Ill. App. 453; *Benson v. Morgan*, 26 Ill. App. 22; *Wheeler v. McDermid*, 36 Ill. App. 179; *Whitesides v. Hunt*, 97 Ind. 191; *Murry v. Ocheltree*, 59 Iowa, 435; S. C., 13 N. W. Rep. 411; *Gregory v. Wendell*, 39 Mich. 337; *Williams v. Tiedeman*, 6 Mo. App. 269; *Cockrell v. Thompson*, 85 Mo. 510; *Hentz v. Miner*, 64 Hun. (N. Y.) 636; S. C., 18 N. Y. Suppl. 880; *Williams v. Carr*, 80 N. C. 294; *Wall v. Schneider*, 59 Wis. 352; *Ashton v. Dakin*, 4 H. & N. 867.

IV. In consequence of the manner in which these transactions are now carried on through the medium of Exchanges and Boards of Trade, it very rarely happens that a future contract is made directly between the parties. It is usually effected through the medium of a broker employed for that purpose; and this introduces a new element for consideration, viz.: whether the broker, thus employed, is to be viewed as a mere agent, unaffected by the illegal intent of the parties, or whether he is so far affected by that intent as to be precluded from recovering advances and commissions on account of such contract.

The rule in England, as laid down in *Thacker v. Hardy*, 4 Q. B. D. 685; S. C., 27 W. R. 158, seems to be, that the broker, even with knowledge of the customer's illegal intent, is merely the agent of the latter; and that as there is no agreement between him and the customer to buy or sell, there is no illegality in his employment, and he can recover advances and

commissions : *Rosewarne v. Billing*, 15 C. B. N. S. 316; see, however, *Cooper v. Neil*, U. N., 1878, p. 128. But in America the far more reasonable rule is adopted that "when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction : " *Irwin v. Williar*, 110 U. S. 499; S. C., 4 Sup. Ct. Rep. 160; *Embrey v. Jamison*, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; *Re Green*, 7 Biss. C. Ct. 338; *Phelps v. Holderness*, 56 Ark. 300; S. C., 19 S. W. Rep. 921; *Walters v. Comer* (Ga.), 5 S. E. Rep. 292; *Bk. v. Cunningham*, 75 Ga. 366; *Cothran v. Ellis*, 125 Ill. 496; S. C., 16 N. E. Rep. 646; *Wheeler v. McDermid*, 36 Ill. App. 179; *Stewart v. Schall*, 65 Md. 289; *Harvey v. Merrill*, 150 Mass. 1; S. C., 22 N. E. Rep. 49; *Hill v. Johnson*, 38 Mo. App. 383; *Crawford v. Spencer*, 92 Mo. 498; *Kahn v. Walton*, 46 Ohio St. 195; S. C., 20 N. E. Rep. 203; *Lester v. Buel* (Ohio), 30 N. E. Rep. 821; *Fareira v. Gabell*, 89 Pa. 89; *Dickson v. Thomas*, 97 Pa. 278. One who deals with a broker deals with him as a principal, not as an agent: *Ruchizky v. De Haven*, 97 Pa. 202. It does not matter that some of the parties with whom the broker dealt were actual buyers and sellers. The illegal intent pervades the whole course of dealing: *Fareira v. Gabell*, 89 Pa. 89; *Miles v. Andrews*, 40 Ill. App. 155. The question is purely between the broker and the customer, and his dealings with third parties are immaterial on the question of the understanding between them: *Griswold v. Gregg*, 24 Ill. App. 384; *Kennedy v. Stout*, 26 Ill. App. 133; *Miles v. Andrews*, 40 Ill. App. 155.

Two cases only appear to favor the English rule: *Taylor v. Penquite*, 35 Mo. App. 389, which rests on a mistake as to the decision in *Cockrell v. Thompson*, 85 Mo. 510; and *Barnes v. Smith* (Mass.), 34 N. E. Rep. 403, which seems to cling to the idea that the broker is the agent only of the customer; but these are of no weight against the preponderance of authority cited.

If, however, the broker is ignorant of the illegal design of

his customer, and acts in good faith, the contract is good as to him, and he can recover his advances, commissions and losses: *Rountree v. Smith*, 15 Repr. 609; *Irwin v. Williar*, 110 U. S. 499; S. C., 4 Sup. Ct. Rep. 160; *Lehman v. Feld*, 37 Fed. Rep. 852; *Edwards v. Hoeffinghoff*, 38 Fed. Rep. 635; *Boyd v. Hanson*, 41 Fed. Rep. 174; *Murry v. Ocheltree*, 59 Iowa, 435; S. C., 13 N. W. Rep. 411; *Williams v. Carr*, 80 N. C. 294; *Potts v. Dunlap*, 110 Pa. 177; S. C., 20 Atl. Rep. 413.

V. As the intent of the parties is the criterion of the nature of the contract, anything which goes to show that intent is admissible as evidence in a suit founded on the contract: *Yerkes v. Salomon*, 11 Hun. (N. Y.) 471; *Cassard v. Hinman*, 6 Bosw. (N. Y.) 14; *Hentz v. Miner*, 58 Hun. 428; S. C., 12 N. Y. Suppl. 474. All the circumstances surrounding the transaction, and the conduct of the parties with reference to it, are legitimate evidence on this question: *Boyd v. Hanson*, 41 Fed. Rep. 174; *Hill v. Johnson*, 38 Mo. App. 383. The general course of dealing between the parties is some evidence, though not conclusive, of the nature of the transaction in question: *Watte v. Costello*, 40 Ill. App. 307; *Lower v. Young*, 59 Iowa, 364; S. C., 13 N. W. Rep. 329; *Kenyon v. Luther*, 4 N. Y. Suppl. 498; S. C. aff., 10 N. Y. Suppl. 951. And so is the general course of dealing of the Board or Exchange, of which the broker is a member: *Beveridge v. Hewitt*, 8 Ill. App. 467. But it is not allowable to give in evidence special instances of illegal transactions, either with the party to the contract, or with third persons: *Gruner v. Stucken* (La.), 3 So. 338; *Dwight v. Badgley*, 60 Hun. (N. Y.) 144; S. C., 14 N. Y. Suppl. 498; *Potts v. Dunlap*, 110 Pa. 177; S. C., 20 Atl. Rep. 1413. Even the subsequent acts of the parties may be evidence of their original intent: *Clarke v. Foss*, 7 Biss. C. Ct. 540.

The rules of the Board or Exchange on whose floor the dealings are carried on are admissible on the construction of the contract: *Bartlett v. Smith*, 13 Fed. Rep. 263; *Bibb v. Allen*, 149 U. S. 481; S. C., 13 Sup. Ct. Rep. 950. When the rules provide that if further margins are not put up on notice, the

contract may be treated as filled, and the other party may recover the difference between the contract and market price, without any performance or offer to perform on his part, they will make a contract good on its face illegal and void: *Lyon v. Culbertson*, 83 Ill. 33; S. C., 25 Am. Rep. 349. But if the illegal intent be otherwise proven, the rules cannot be invoked to show that, according to them, actual delivery must be made: *Mackey v. Rausch*, 60 Hun. (N. Y.) 583; S. C., 15 N. Y. Suppl. 4.

The ability of the parties to perform their contracts is a very material circumstance; for if their means are wholly disproportioned to the value of the goods purchased, the inference is strong that the transaction is not *bona fide*: *Beveridge v. Hewitt*, 8 Ill. App. 467; *Curtis v. Wright*, 40 Ill. App. 491; *Myers v. Tobias* (Pa.), 16 Atl. Rep. 641; S. C., 24 W. N. C. 432; *Gaw v. Bennett*, 153 Pa. 247; S. C., 31 W. N. C. 557; 25 Atl. Rep. 1114; *Watte v. Wickersham*, 27 Neb. 457; S. C., 43 N. W. Rep. 259. It has also been held that when the sum deposited with the broker bears no proper proportion to the value of the stock ordered, the inference is that a gambling contract was intended; but this is hardly consonant with the weight of authority: *Patterson's App.* (Pa.), 13 W. N. C. 154.

When the evidence showed that the brokers were willing to buy or sell for the customer at their own risk without inquiry as to his financial ability, so long as he put up the necessary "margins;" that when he failed to advance further funds, the brokers, without offering to deliver or demanding the price of the cotton, promptly closed out the contract and demanded the difference between the contract and market price, the facts show a gambling contract: *Phelps v. Holderness*, 56 Ark. 300; S. C., 19 S. W. Rep. 921. So, evidence that the customer was not a refiner of oil, or one who would buy for his own consumption; that he had not sold the oil when he exercised his option; that he did not intend to exercise it if the market price fell below that fixed in the agreement, joined to proof that he was financially unable to take and pay for the whole amount of oil he had contracted for, leads to the conviction

that the contract was a gambling one: *Kirkpatrick v. Bonsall*, 72 Pa. 155. But when the customer pays a part of the purchase price, leaves stock with the broker till paid for, and directs him to sell it again, the contract is valid: *Eggleston v. Rumble*, 66 Hun. (N. Y.) 627; S. C., 20 N. Y. Suppl. 819. And when the wheat purchased is delivered in the form of warehouse receipts, which would entitle the purchasers to actual delivery of it on presentation thereof, the transaction is good: *Fisher v. Fisher*, the principal case (Ind.), 36 N. E. Rep. 296.

Ordinarily, the burden of proof lies on the party asserting the illegality of a contract good on its face: *Benson v. Morgan*, 26 Ill. App. 22; *Mohr v. Miesen*, 47 Minn. 228; S. C., 49 N. W. Rep. 862; *Harris v. Tumbridge*, 83 N. Y. 92. But though an illegal intent will not be presumed: *Story v. Salomon*, 71 N. Y. 420; yet experience has so proved the likelihood of illegal intent in future contracts, that the tendency seems now to be to put the burden of proof on the one who seeks to enforce the contract, at least when a doubt has been cast upon it by the testimony of the opposite party: *Wheeler v. McDermid*, 36 Ill. App. 179; *First Nat'l Bk. v. Oskaloosa Co.*, 66 Iowa, 41; S. C., 23 N. W. Rep. 255; *Sprague v. Warren*, 26 Neb. 326; S. C., 41 N. W. Rep. 1113; *Cobb v. Prell*, 16 Cent. L. J. 453; *Barnard v. Backhaus*, 52 Wis. 593.

VI. In Illinois, the statute against dealing in futures is peculiarly strict. "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold . . . shall be fined . . . and all contracts made in violation of this section shall be considered gambling contracts, and shall be void:" Cr. Code Ill., § 130. It is the rule under this statute that any future contract, other than an actual sale, is void: *Webster v. Sturges*, 7 Ill. App. 560; *Locke v. Fowler*, 41 Ill. App. 66; *Schneider v. Turner*, 130 Ill. 28; S. C., 22 N. E. Rep. 497; *Aff. S. C.*, 27 Ill. App. 220; *Pearce v. Foote*, 113 Ill. 228; *Corcoran v. Coal Co.*, 138 Ill. 390; S. C., 28 N. E. Rep. 759; but see *Richter v. Frank*, 41 Fed. Rep. 859. The same seems to be the rule in Iowa: *Osgood*

v. Bauder, 82 Iowa, 171; S. C., 47 N. W. 1001. This, however, applies to optional sales only. If the sale be absolute, and the delivery only is future, the contract is still valid: *White v. Barber*, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221; *Wolcott v. Heath*, 78 Ill. 433; *Logan v. Brown*, 81 Ill. 415.

VII. When the contract is illegal, and cannot be enforced, a security founded on that contract is void in the hands of the principal, of the broker, if *particeps criminis*, or of a purchaser with notice: *Steers v. Lashley*, 6 T. R. 61; *Re Green*, 7 Biss. C. Ct. 338; *Embrey v. Jemison*, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; *Brown v. Alexander*, 29 Ill. App. 626; *Cothran v. Ellis*, 125 Ill. 496; S. C., 16 N. E. Rep. 646; *Davis v. Davis*, 119 Ind. 511; S. C., 21 N. E. Rep. 1112; *Swartz's App.*, 3 Brewst. (Pa.) 131; *Griffith's App.*, 16 W. N. C. (Pa.) 249; *Dempsey v. Harm* (Pa.), 12 Atl. Rep. 27; S. C., 9 Cent. Rep. 615; *Brua's App.*, 55 Pa. 294; *Fareira v. Gabell*, 89 Pa. 89; *Griffiths v. Sears*, 112 Pa. 523; *Oliphant v. Markham*, 79 Tex. 543; S. C., 15 S. W. Rep. 569; *Barnard v. Backhaus*, 52 Wis. 593. If the broker be innocent he can recover, and so can a *bona fide* holder: *Lehman v. Strasberger*, 2 Woods C. Ct. 554; *Pearce v. Rice*, 142 U. S. 28; S. C., 12 Sup. Ct. Rep. 130; *Sondheim v. Gilbert*, 117 Ind. 71; *Crawford v. Spencer*, 92 Mo. 498. But when the making of such a contract is declared a crime by statute, a security founded thereon is void, even in the hands of a *bona fide* holder: *Hawley v. Bibb*, 69 Ala. 52; *Cunningham v. Bank*, 17 Cent. L. J. 470; *Bank v. Curningham*, 75 Ga. 366; *Snoddy v. Bank*, 88 Tenn. 573; *Bank v. Carroll*, 80 Iowa, 11; S. C., 45 N. W. Rep. 304.

VIII. One who is a party to such an illegal contract cannot, either at common law or in equity, recover money paid in furtherance of the transaction. As we have seen the broker cannot recover his advances on behalf of his principal, nor can the principal recover the money deposited with the broker as margins: *Lawton v. Blich*, 83 Ga. 663; S. C., 10 S. E. Rep. 353; *O'Brien v. Luques*, 81 Me. 46; S. C., 16 Atl. Rep. 304; *Burt v. Myer*, 71 Md. 467; *Gregory v. Clark*, 39 Mich. 337; *Ruchizky v. De Haven*, 97 Pa. 202; *Stewart*

v. Parnell, 147 Pa. 523; S. C., 29 W. N. C. 537; 23 Atl. Rep. 838; *Sowles v. Bank*, 61 Vt. 375; S. C., 17 Atl. Rep. 791. There are occasional exceptions to this rule. Thus the customer can recover if he intended a *bona fide* sale and delivery: *Gregory v. Clark*, 39 Mich. 337. A minor can recover money so paid by him during minority: *Ruchizky v. De Haven*, 97 Pa. 202. When the broker acknowledges a balance in his hands in favor of the customer, the latter may recover, if he can show that the broker received the money for his use: *Peters v. Grim* (Pa.), 30 W. N. C. 177; S. C., 24 Atl. Rep. 192; *Repplier v. Jacobs*, 30 W. N. C. 180; S. C., 24 Atl. Rep. 194; *Floyd v. Patterson*, 72 Tex. 202; S. C., 10 S. W. Rep. 526. So a deposit of margins can be recovered if the customer revoke his illegal instructions: *Dancy v. Phelan*, 82 Ga. 243; S. C., 10 S. E. Rep. 205. Or if his complaint does not on its face show an illegal contract: *Clarke v. Brown*, 77 Ga. 606.

If by statute, however, such payments are made recoverable in many of the States of the Union. The question depends on the wording of the particular statute; but in general either party may recover of the other: *Cushman v. Root*, 89 Cal. 373; S. C., 26 Pac. Rep. 883; *Kennedy v. Stout*, 26 Ill. App. 133; *N. Y. & Chic. Grain & Stock Exch. v. Mellen*, 27 Ill. App. 556; *Lyons v. Hodges* (Ky.), 13 S. W. Rep. 1076; *Peck v. Doran*, 46 Hun. (N. Y.) 454; *Copley v. Doran*, 1 N. Y. Suppl. 888; *Lester v. Bucl* (Ohio), 30 N. E. Rep. 821. Though it has been held that the broker cannot recover in Illinois: *White v. Barber*, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221.

One who knowingly lends money for the purpose of furthering a gambling transaction in futures cannot recover it: *Waugh v. Beck*, 114 Pa. 322; *Plank v. Jackson*, 128 Ind. 424; S. C., 26 N. E. Rep. 568, but if he take no part in the transaction mere knowledge on his part that the money was to be so used, will not preclude him from recovery: *Armstrong v. Bank*, 133 U. S. 433; S. C., 10 Sup. Ct. Rep. 450; *Jackson v. Bank*, 125 Ind. 347; S. C., 25 N. E. Rep. 430. The true test is whether or not he requires the aid of the

illegal transaction to make out his case; if so, he cannot recover; if not, he can: *Armstrong v. Bank*, *supra*.

IX. In all cases of alleged gambling contracts in futures, the question as to their nature is one of fact, not of law; for the jury, not for the court: *Washer v. Bond*, 40 Kans. 84; S. C., 19 Pac. Rep. 323; *Fareira v. Gabell*, 89 Pa. 89; *Thompson v. Reiber*, 123 Pa. 457; S. C., 23 W. N. C. 180; 16 Atl. Rep. 793.

X. There is one very curious kind of future contract that has frequently come before the courts during the past few years. This is what is known as a "Bohemian Oats" contract. By it a quantity of oats, professedly of a special brand, but in reality of ordinary kind, is sold to a farmer at a price far above its real value, and a bond is given by the seller to buy back a certain number of bushels of the crop at a high figure, promising a profit to the unwary agriculturist. With but one exception, *Watson v. Blossom*, 2 N. Y. Suppl. 551; S. C. Aff., 4 N. Y. Suppl. 489, these contracts have been held illegal as against public policy, and notes given on them void, except in the hands of a *bona fide* holder, subject to the exception in the latter case due to the operation of criminal statutes, as explained in *Schmueckle v. Waters*, 125 Ind. 265; S. C., 25 N. E. Rep. 281; *Glass v. Murphy* (Ind. App.), 30 N. E. Rep. 1097; *Kain v. Bare* (Ind. App.), 31 N. E. Rep. 205; *Merrill v. Packer*, 80 Iowa, 542; S. C., 45 N. W. Rep. 1076; *Shipley v. Reasoner*, 80 Iowa, 548; S. C., 45 N. W. Rep. 1077; *Sutton v. Beckwith*, 68 Mich. 303; S. C., 36 N. W. Rep. 79; *Mace v. Kennedy*, 68 Mich. 389; S. C., 36 N. W. Rep. 187; *McNamara v. Gargett*, 68 Mich. 454; S. C., 36 N. W. Rep. 218. The first Iowa case on this subject, *Hanks v. Brown*, 79 Iowa, 560; S. C., 44 N. W. Rep. 811, decided that such a contract was not obnoxious to the statute of that State against gambling contracts, strangely enough forgetting all about the common law and public policy; but this omission has been corrected by the later cases from that State cited above.

XI. A contract to "corner" the market by buying up stock or goods is illegal at common law as against public

policy: *Samuel v. Oliver* (Ill.), 22 N. E. Rep. 499; *Sampson v. Shaw*, 101 Mass. 145.

An agreement by which one guarantees to another that cattle to be sold by the latter shall bring so much a head, binding himself to pay the difference if they bring less, while the owner agrees to pay the difference to the guarantor in case they bring more, is a wager on the price of the cattle, and a note given for such difference is void: *Bank v. Carroll*, 89 Iowa, 11; S. C., 45 N. W. Rep. 304.

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DICKSON v. WALDRON.¹ SUPREME COURT OF INDIANA.

The manager of a theatre is responsible for the acts of a special police who was appointed for the theatre, at the special request of the manager, by the Board of Metropolitan Police Commissioners, and who was employed and paid solely by such manager: 34 N. E. Rep. 306, affirmed.

The manager is liable for an assault and battery on an offensive patron by the special police, when acting as doorkeeper, since such act was within the scope of his employment in his master's business: 34 N. E. Rep. 306, affirmed.

LIABILITY OF A THEATRE MANAGER FOR ASSAULT COMMITTED BY A SPECIAL POLICEMAN.

The liability of a master for an assault and battery committed by his servant is based on the common law principle "*Qui facit per alium facit per se*," the theory being that the master in selecting his servants must do so with prudence and caution, and must select persons capable of fulfilling the duties

¹ Reported in 35 N. E. Rep. 1, Nov. 24, 1893.

he will exact under penalty of his personal responsibility for their torts.

This theory has been greatly modified in modern jurisprudence, until to-day the true criterion of the master's liability is embodied in the answer to the question, "Is the act complained of within the scope of the servant's authority?" If so, the master is liable; otherwise, not.

The test, as laid down by Cooley, is "not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name:" Torts, 536. The great difficulty in applying this principle lies in defining what acts properly fall within the scope of the servant's employment. In the case of *Ware v. Barataria*, 15 La. 169, it was held that where an agent lost sight of the object for which he was employed and committed a wrong, thereby causing damage, the principal was no more answerable for it than any stranger, the agent in such case acting of his own will, and not in the course of his employment, or under any implied authority of his principal. The duty of defendant's servant in this case was to open and close certain river locks and collect tolls, and the offence complained of by plaintiff was an assault and battery received by him from defendant's servant under pretext of said plaintiff not having paid his toll. This ruling was followed in the subsequent case of *Block v. Bannerman*, 10 La. Ann. 1, where the owner of a vessel was held liable for the tortious acts of the master, committed whilst in his service and within the scope of his authority.

The principle is true even if the tort be committed in disobedience to the master's orders: *R. R. Co. v. Derby*, 14 How. 468. In a comparatively recent case, the Supreme Court of Louisiana decided that plaintiff could not recover damages against the master for a wanton and unprovoked assault inflicted on him by defendant's servant, the plaintiff being a passenger on a train to which a Pullman Palace Car was attached, of which defendant's servant was porter, and having entered the palace car to ask permission to wash his hands. The court held that the assault was something which the ser-

policy: *Samuel v. Oliver* (Ill.), 22 N. E. Rep. 499; *Sampson v. Shaw*, 101 Mass. 145.

An agreement by which one guarantees to another that cattle to be sold by the latter shall bring so much a head, binding himself to pay the difference if they bring less, while the owner agrees to pay the difference to the guarantor in case they bring more, is a wager on the price of the cattle, and a note given for such difference is void: *Bank v. Carroll*, 89 Iowa, 11; S. C., 45 N. W. Rep. 304.

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Rich. 212; Rich v.
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R. Co., 4 Gray, 465;
James v. Wakefield,
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or agent commit a tort
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not be liable therefor unless
quently ratified the act: "
117. Where a servant in
does an act which he is not
responsible: Towanda Coal
master is liable for the results
if within the scope of his
command or with
12; Yerger et
Lain, 91 Pa. 4
v. Turnpike Co.
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vant's employment did not contemplate, and was not, therefore, within its scope: *Williams v. Palace Car Co.*, 40 La. Ann. 87.

In the case of *Turner v. Western, etc.*, R. R. Co., 72 Ga. 292, it was held that where one was lawfully in the cab of the freight train of a railroad treating for his passage, as had frequently been done, and was still being done at times of trial by other persons on the same train, as to an injury inflicted upon him he stands within the reason and spirit of the authorities in reference to like injuries done to passengers.

"The general doctrine with reference to master and servant, employer and employee, is, that when the employee committing the injury is not at the time executing the employer's business or not acting within the scope of his employment the employer is not responsible:" Pryor, C. J., in *Winnegar's Admr. v. R. R. Co.*, 85 Ky. 547.

In *McKinley v. The C. & N. W. R. R. Co.*, 44 Iowa, 314, an action was brought to recover damages for an assault by defendant's brakeman on plaintiff while latter was attempting to enter a passenger car at Howard Junction, Wisconsin, on March 22, 1872. Seevers, C. J., delivering the opinion, said: "If we were left to determine the question upon principle, whether an employer should be held liable for the wilful or criminal acts of the employee done in the course of his employment, we should have very little or no hesitation in affirming such liability, and this because the employer has placed the employee in a position to do wrong, and it being done in the course of his employment, the intent with which it was done should not affect the liability of the employer whether the intent of the employee is good or ill. So long as he acts within the scope of his employment the employer should be bound. The decided weight and number of the authorities are in accord with this view. We need only refer to some of them without stopping to discuss or review them." See *Turner v. North Branch R. R. Co.*, 4 Cal. 494; *G. Western R. R. Co. v. Miller*, 19 Mich. 305; *Finney v. R. R. Co.*, 19 Wis. 395; *Brooks v. Penna. Cent. R. R. Co.*, 57 Pa. 339; *St. Louis, etc., R. R. Co. v. Dalby*, 19 Ill. 353; *R. R. Co. v. Wetmore*, 19 Ohio, 110; *Isaacs v. R. R. Co.*, 47 N. Y. 122;

Goddard v. Grand Trunk R. R. Co., 57 Mich. 212; Rich v. Bryant, 106 Mass. 180; Cracker v. C. & N. W. R. R. Co., 36 Wis. 657.

"A railroad corporation is liable to the same extent as an individual would be for an injury done by its servant in the course of his employment: Moore v. R. R. Co., 4 Gray, 465; Hewett v. Swift, 3 Allen, 420; Holmes v. Wakefield, 12 Allen, 580. If the act of the servant is within the general scope of his employment, the master is equally liable whether the act is wilful or merely negligent: Howe v. Newmarch, 12 Allen, 49. Or even if it is contrary to an expressed order of the master: R. R. Co. v. Derby, 14 How. 468. . . . We deem it unnecessary to cite further authorities on this point. The principle lying at the foundation of the doctrine is as old as the common law, and is embodied in the maxim *qui facit per alium facit per se*, and is as applicable to corporations as to individuals. Doubtless, if a servant or agent commit a tort out of the scope of his agency or employment and not connected with it, the principle would not be liable therefor unless he previously authorized or subsequently ratified the act:" Ramsden v. R. R. Co., 104 Mass. 117. Where a servant in the employment of his master does an act which he is not employed to do the master is not responsible: Towanda Coal Co. v. Heeman, 86 Pa. 418. A master is liable for the results of the wilful conduct of his servant if within the scope of his authority, or for acts done by his command or with his assent: R. R. Co. v. Wilt, 4 Whart. 142; Yerger et ux. v. Warren, 7 Casey, 319; R. R. Co. v. McLain, 91 Pa. 442; Ry. Co. v. Donahue, 70 Pa. 119; Higgins v. Turnpike Co., 46 N. Y. 23.

A corporation is liable for the wilful acts and torts of its servants done to the injury of others, within the general scope of their employment: Terre Haute, etc., R. R. Co. v. Jackson, 81 Ind. 19; Jeffersonville, etc., R. R. Co. v. Rogers, 38 Ind. 116; Express Co. v. Patterson, 73 Ind. 430; Wabash Ry. Co. v. Savage, 110 Ind. 156; Ry. Co. v. Anthony, 43 Ind. 183.

The act of the agent within the general scope of his employment is the act of the master, and if wrongful the master is liable, although the act be unnecessary to the per-

formance of the master's service and was not intended for that purpose. The liability of the master does not depend upon the necessity of the act, or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent: *Indianapolis, etc., Ry. Co. v. Anthony*, 43 Ind. 183.

In *Noblesville, etc., v. Gause*, 76 Ind. 142, it is said: "Counsel have cited cases declaring the familiar rule that a master is responsible for the acts of the servant, only when the latter is acting within the scope of his employment; but this was an unnecessary work, for the general rule is too well settled and understood to need support from adjudged cases."

If a servant does a wrongful act without the authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible therefor; but if the act be done in the execution of the authority given by the master and for the purpose of performing what he has directed, he is responsible whether the wrong done be occasioned by negligence or by a wanton and reckless purpose to accomplish his business in an unlawful manner: *Howe v. Newmarch*, 12 Allen, 49.

By the civil law the liability was confined to the person standing in the relation of *paterfamilias* to the wrongdoer: Dig. lib. 9, tit. 3. But by the English law the liability is more extensive.

In *McManus v. Crickett*, 1 East. 106, Lord Kenyon, C. J., after quoting Chief Justice Holt in *Middleton v. Fowler*, Salk. 282, to the effect, "that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him," says: "Now, when a servant quits sight of the object for which he is employed, and without having in view his master's order, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act." See *Turberville v. Stamp*, 1 Ld. Ray. 264.

A master, however, is *not responsible* for the wrongful act of his servant unless that act be done in the execution of the

authority given by his master. *Beyond the scope of his employment* he is as much a stranger to his master as any third person, and therefore his act cannot be regarded as the act of his master: *Lamb v. Palk*, 9 C. & P. 629; *Garth v. Howard*, 8 Bing. 451; *Wilson v. Rankin*, 34 L. J., Q. B., 62; *McGowan v. Dyer*, L. R., 8 Q. B. 141.

A master is liable for injury caused by the wanton and violent conduct of his servant in the performance of an act within the course of his employment: *Seymour v. Greenwood*, 7 H. & H. 356; *Croft v. Alison*, 4 B. & Ald. 590; *Limpus v. Omnibus Co.*, 1 H. & C. 526; and such act only binds when done by the authority or consent of the master: *Ward v. Evans*, 2 Salk. 441; *Lyons v. Martin*, 8 Ad. & E. 512; *Gregory v. Pipe*, 9 B. & C. 591.

In *Drew v. Peer*, 93 Pa. 234, Thayer, P. J., instructed the jury that "the defendant is responsible for any loss or damage suffered by himself in consequence of the misconduct of the defendant's agents. It did not require an express direction to her agents to commit this injury to make her responsible." The instruction was affirmed by the Supreme Court, the facts in this case being almost identical with those of *Dickson v. Waldron*.

The following quotations are taken from the celebrated Doctor Fraser's work on the Scottish law of Master and Servant, as illustrative of the question in that country:—

"*Quasi delicts* have been defined by the Roman jurist, *facta illicita sola culpa sine dolo admissa*. They are acts which arise from carelessness, negligence, rashness, or want of skill, by which injury has been sustained, without any criminal intention on the part of the doer.

"If a servant does a wrongful act without the authority, and not for the purpose of executing the orders or doing the work of the master, the latter is not responsible in damages therefor; but if the act be done in the execution of the authority given by the master, and for the purpose of performing what he has directed, he is responsible whether the wrong done be occasioned by negligence, or by a wanton and reckless purpose to accomplish his business in an unlawful manner.

" The liability of the master for the servant's *quasi* delicts rests partly on the same principle with his liability for his servant's contracts:—viz., that expressed in the maxim, *qui facit per alium facit per se*,—partly on views of expediency, and partly also on the following grounds: The master is presumed to select the servant from a knowledge of, or at least a belief in his skill, steadiness, and care. He places him in a position in which he acquires a relation to the public which he would not otherwise hold,—a position entailing responsibilities which, but for their being thus delegated to another, the master would have to discharge for himself. Also, he entrusts him with the charge of property often calling for carefulness in its management, to avoid accident to others; and thus puts it in his power, by carelessness or rashness, to inflict injury on others to an extent that would not otherwise exist. For these and similar reasons the laws of most countries have sanctioned a departure, where the relation of master and servant exists, from the general principle, *culpa lenit suos actores*. Page 150.

" First, it may be observed that the master is of course liable to answer for any injury caused by the servant in the direct execution of his express orders. With regard to this class of cases there is no difficulty; the connection between the wrong and the authority from which the act flowed is immediate, and sufficiently obvious.

" But, secondly, it falls to be remarked that, to make the master liable, no such immediate connection between his command and the act out of which the injury results is requisite. It is sufficient, in order to entail such responsibility on the master, that the servant was at the time acting under the general mandate implied in his contract of service—that he was doing his master's work, or even that he was at the time employed in an operation which might fairly be held to fall within the scope and sphere of his duties as servant, even though the master may have been utterly ignorant that his servant was engaged in that particular duty at the time.

" Two well marked exceptions to, or rather limitations of the rule, are to be noticed as now well settled by a series of decisions.

"The first of these is, that the rule only applies where the injury caused by the servant, for which it is sought to make the master answerable, arises out of something done by him while acting strictly within the scope and limits of his employment while discharging the duties for which he has been engaged under his contract with his master. The reason of this exception is, that the master's liability, having its origin in implied mandate, can have no place where the limits of that mandate are exceeded.

"The second exception is, that the rule applies only where the relation of master and servant exists in a strict and proper sense between the offending party and him whom it is sought to make responsible for the act. Where this is not the case, there is no room for applying the maxim, *respondet superior*." Page 151.

"The rule which is now established is, to quote the words of Willes, J., in *Barwick v. The English Joint Stock Bank*—an action against a bank for fraudulent misrepresentation on the part of its manager—that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Macdonell, *Master and Servt.* 258.

"A master is liable for the wrongful act of his servant, to the injury of a third person, where the servant is engaged at the time in doing his master's business, and is acting within the general scope of his authority, although he is reckless in the performance of his duty, or through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty, and inflicts unnecessary and unjustifiable injury." Wood, *Master and Servt.* (2d Ed.) 589.

A master is liable for the act of his servant done in the course of his employment: *Helyear v. Hawke*, 5 Esq. 72.

As to the servant's tort and negligence, the universal rule is, that the master is responsible in damages to third persons for the act of his servant occasioning an injury, whether the act is of omission or commission, in conformity to or in

disobedience of the master's order, by negligence, fraud, deceit, or even wilful misconduct so long as it was in the course of the employment: Browne, Dom. Rel. 136.

The master is not liable for a wrongful, wilful, and unlawful, act of his servant toward a third person, although the servant professes to be acting in the master's employment, if the act is entirely independent and outside of and having no proper connection with the employment: Browne, Dom. Rel. 138.

A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servants if those acts are done in the course of his employment in his master's service. The maxims applicable to such cases being *respondet superior* and *qui facit per alium, facit per se*: Smith, Master and Servant, 322.

This rule is universal in its application and whether the act be negligent, fraudulent or deceitful, or even an act of positive malfeasance or misconduct, if done in the course of his employment, the master is responsible *civiliter* to third persons: Story, on Agency, 452; Paley, on Agency, 294; Pothier, on Oblig. (Evans) 456.

In conclusion, I will cite the following rule laid down by the eminent Judge Cooley, cited with approval by the Supreme Court of Louisiana in the case of *Williams v. Palace Car Co.*, *supra*: "It will readily occur to every mind that the master cannot, in reason, be held responsible generally for whatever wrongful conduct a servant may be guilty of. A liability so extensive would make him guarantor of the servant's good conduct, and would put him under a responsibility, which prudent men would hesitate to assume."

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DEWEY ET AL. v. TOLEDO, A. A. & N. M. Ry. Co.¹ SUPREME
COURT OF MICHIGAN.

The purchase by a railroad company of stock in another company whose line is not parallel, for the purpose of acquiring the latter's right of way, is valid under How. (Mich.) Stat., § 3403, authorizing any railroad company which had in good faith entered upon the construction of its road and become unable to complete the same, to sell the road and its rights and franchises to any other railroad company not having the same terminal points and not being a competing line.

THE POWER OF ONE RAILROAD COMPANY TO PURCHASE STOCK IN ANOTHER.

The rapid tendency towards consolidation of smaller railroad companies into great systems, now progressing in the United States, makes the question of the legality of a course not unfrequently practiced for such a purpose, one of much interest.

A corporation is a creature of the Act of Incorporation and as such has no other powers than are expressly granted or are necessary to effect the ends and objects of its existence. The charter being a contract between the public and individuals must be strictly construed. Each right the corporation possesses need not be specially enumerated, but no authority can be inferred other than for purposes directly conferred: *The New Orleans, etc., Co. v. Dock Co.*, 28 La. Ann. 173; *Franklin v. Lewiston Institution for Savings*, 68 Me. 43.

¹ Reported in 51 N. W. Rep. 1063.

The right of a railroad company over its funds cannot be construed according to the rules applicable to literary, scientific and religious corporations. Such corporations require authority to invest their money in order to maintain themselves and preserve whatever may be given them. In such charters the power, if not expressly mentioned, is implied, that they may successfully engage in the enterprises for which they are organized and render what funds they have productive.

At common law the directors of one railroad company have no authority to invest their capital or profits in the stock of another. Railroad corporations are chartered to transport passengers or merchandise, and are bound to apply all the monies and property of the company for that purpose. Investing their funds in that of other corporations is not within the scope of the business for which they are incorporated: *Munsell v. Midland, etc., R. R. Co.* (1863), 1 H. & M. 130; *Woods v. Memphis, etc., R. R. Co., 5 Ry. & Corp. L. J.* 372; *Hazelhurst v. The Savannah, etc., R. R. Co.*, 43 Ga. 13; *Haver v. New York, etc., R. R. Co.*, 19 Abb. N. Cas. 456; *MacIntosh v. Flint, etc., R. R. Co.*, 34 Fed. Rep. 582; *The Central, etc., R. R. Co. v. The Penna. R. R. Co.*, 36 N. J. Eq. 475; *Solomens v. Laing*, 12 Beav. 339; *The Great Northern Ry. Co. v. The Great Eastern Counties Ry. Co.*, 21 L. J. Ch. 837; *The New Orleans, etc., Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; *The Great Western Ry. Co. v. The Metropolitan Ry. Co.*, 32 L. J. Ch. 382; *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20.

"Every charter of a private corporation is a contract, first between the State and the corporation—to which each is solemnly bound—the State that it will not impair the obligation—the corporation that it will perform the objects of its corporation and keep within the powers granted to it; secondly, between the stockholders themselves. The stockholders are bound to consent to the management of the affairs of the corporation by the majority, and by the by-laws which the majority makes. And the whole on the other hand agree with each other that they will apply the funds of the company to the

objects and purposes of the charter and not otherwise. Both as between the State and the corporators, the law of this contract is the charter. The State has granted to it no rights and the individual stockholders have clothed it with no rights, except such as are clearly and expressly set down in the charter: *Central R. R. Co. v. Collins*, 40 Ga. 582.

State constitutions sometimes contain express prohibitions against the purchase of stock in other roads. On the other hand, single companies are occasionally authorized to do so by their charters and in other instances, general law; *Zabriskie v. R. R. Co.*, 23 How. (U. S.) 381; or special Acts; *Mayor of Balto. v. Balto., etc., R. R. Co.*, 21 Md. 50; confer the power.

If one railroad company may, at its option, buy the stock of another it undertakes a new contract not contemplated by its charter: *Hazelhurst v. The Savannah, etc., R. R. Co.*, 43 Ga. 13.

It is no answer that the action of the directors is of benefit or profit to the shareholder seeking to prevent the purchase. Whether it is to his interest, is for him to judge. He has a legal right to insist that the company shall be kept within the legitimate scope of the charter: *Elkins v. Camden, etc., R. R. Co.*, 36 N. J. Eq. 5; *Central R. R. Co. v. Collins*, 40 Ga. 582.

Power expressly granted to a railroad company to maintain the road does not authorize a purchase of stock in a rival road because such purchase is necessary to its self preservation.

The Central Railroad Company was given by its charter power to "have, purchase, receive, possess, enjoy and retain to them and their successors, lands, rents, tenements, goods, chattels and effects, of whatsoever kind, nature and quality, the same may be, and to sell, grant, demise, alien or dispose of the same." It was argued that such an indefinite grant authorized them to purchase and hold any kind of property necessary to protect the road, and was not precluded such a construction by a proviso restricting the power to such lands as it might acquire in satisfaction of debts and such as might be necessary and proper for laying, building and sustaining the railroad. In reply it was said by the court, "To give these words the meaning contended for would be to make the Central Railroad

and Banking Company a corporation for any purpose whatever. It might engage in whatever enterprise that the cupidity of its directors or their fancy or folly might suggest to them."

"What does a grant to maintain and sustain a railroad include? Can it in any fair sense be construed to authorize the engaging in any other enterprise which will extend the business or lessen the rivalries of the company. The 'maintaining and sustaining' of the road has reference to keeping it in repairs, supplying it with machinery and such like acts and not to projects for extending its business, by schemes and enterprises not contemplated and expressed in clear, unambiguous terms by the charter itself:" *Central R. R. Co. v. Collins*, 40 Ga. 582. See *contra*: *Ryan v. The Leavenworth, etc., R. R. Co.*, 21 Kan. 365; *Atchison, etc., R. R. Co. v. Cochran*, 43 Kan. 225. See, however: *Penna. R. R. Co. v. Com.*, 7 Atl. Rep. 368.

The General Railroad Laws of Michigan provide that one railroad corporation may subscribe to the capital stock of any other railroad company organized under the said Act with the consent of the latter; and by other provisions, one railroad company is authorized to aid another having an unfinished road, and to make running arrangements; and where their lines are connected to enter into arrangements for their common benefit, consistent with and calculated to promote the objects for which they were respectively created. In *MacIntosh v. Flint, etc., R. R. Co.*, 34 Fed. Rep. 582, it was decided that these statutory provisions did not authorize one company to acquire the stock and franchise of another completed company.

A company having authority to purchase a limited number of shares in another cannot increase its holding: *Solomens v. Laing* (1849), 12 Beav. 339; *The Great Western Ry. Co. v. The Metropolitan Ry. Co.*, 32 L. J. Ch. 382.

Since chancery will enjoin acts of this character, so will it decline to lend its aid where, by so doing, it would give effect to them: *The Great Northern Ry. Co. v. The Great Eastern Counties R. R. Co.*, 21 L. J. Ch. 837; *The Great Western Ry. Co. v. The Met. Ry. Co.*, 32 L. J. Ch. 382. In this latter case the company had been authorized by Parliament to hold

a stated number of shares in another road. The directors of this road decided to increase the number of shares, but refused to make any allotment to the other company as shareholder. A bill in equity was filed to compel an award of the proportion which their shares entitled them. In dismissing the bill, Lord Justice Turner, one of the court, observed, while they were not entitled to receive and hold the additional shares, yet had the bill averred an intention to dispose of their allotment and prayed that it be made in order that the benefit to be derived from their sale might be secured to the company, such question would be worthy of much consideration.

The purchase of stock in a parallel and competing line was held to be prohibited by the Constitution of Pennsylvania which provided: "No railroad . . . or the lessees, purchasers or managers of any railroad . . . shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad owning or having under its control a parallel or competing line: *Penna. R. R. Co. v. The Commonwealth (Pa.)*, 7 Atl. Rep. 368.

The right to lease does not give the right to buy a road or become the purchaser of its stock: *Central R. R. Co. v. Collins*, 40 Ga. 582.

By the General Railroad Laws of New Jersey (Rev. p. 730, § 17), and the Act of 1880 (P. L. 1880, p. 231), power was given to railroad companies to lease their roads or any part of them to any other corporation or corporations of that or any other State, or to unite or consolidate as well as merge their stock, property and franchises and roads with those of any other company or companies, and it was further provided that the company acquiring the other road might use and operate both or either of the roads.

The Camden and Atlantic Railroad on the strength of these statutory privileges attempted to purchase the majority of the stock and bonds of a rival road, and assume control of certain of its debts. A bill in equity was brought to prevent such purchase. In sustaining the injunction it was said by the Supreme Court: The Acts of the Legislature while

they gave the Camden and Atlantic Railroad power to unite and consolidate with other roads, it gave it no power to purchase the debts of another company or its road. Union and consolidation of two rival railroad companies are one thing and purchase by one company of the property and franchises of the other is another. Such purchase is foreign to the object of its incorporation. The power to build lateral or branch roads given by the charter, was not considered to strengthen the contended construction: *Elkins v. Camden, etc.*, R. R. Co., 36 N. J. Eq. 5.

Although the company may have authority by the law of the State where it originated, yet it cannot purchase the stock of a road in another State, unless expressly authorized so to do by local legislation: *Woods v. The Memphis, etc.*, R. R. Co. (Ala.), 5 Ry. & Corp. L. J. 372.

A State cannot by an Act subsequent to the charter, confer the power on a railroad to invest its fund in the bonds or stock of another: *Central R. R. Co. v. Collins*, 40 Ga. 582; *White v. The Syracuse, etc.*, R. R. Co., 14 Barb. (N. Y.) 559.

By the Act of 1852, of Georgia, the Central Railroad Company was given power to lease several railroads by name as well as any other road that might "connect" with it, and by a subsequent Act authority was given to connect their tracks at the city of Savannah.

In the opinion of the Supreme Court it was held that, "any such power, though expressly granted, does not bind any of the stockholders who do not consent to it. Each stockholder has rights in the nature of contract, rights in the limitations as well as in the grants to the corporation, and even the legislative will cannot under the Constitution of the United States impair those contract rights, by making him against his will an adventurer in an enterprise not contemplated in the original charter: See also *White v. The Syracuse, etc.*, R. R. Co., 14 Barb. (N. Y.) 559.

If the Legislature has reserved to itself the right to alter the charter of the company, the proper number of shareholders may take advantage of a subsequent Act, authorizing a purchase of stock in another company, by the consent of a certain

road runs, are chosen to serve with them. Laws have been introduced in various states to check the abuses to which the methods of receiverships have given rise, but while these statutes have done good as to certain matters of detail, the commercial facts of which we have spoken have been strong enough thus far to prevent any material modification of the policy.

The immediate cause of a railway receivership is usually the floating debt. Strictly speaking, the expression "Floating Debt" means the money borrowed by a company on collateral and made payable on demand or within a short time. The term, however, is sometimes used to cover other debts of the corporation, such as for supplies which have been bought but not paid for. A railway which is fairly prosperous can arrange to pay its bond interest in a period of depression without showing signs of distress. Every large business concern, such as a manufactory, must arrange for a depreciation of plant and machinery before setting aside earnings applicable to interest or dividends. The reason for this is that were a contrary course to be pursued, the stock or bond holders would very shortly find themselves in possession of a worthless property. In factories the expected losses from depreciation are usually arranged for by setting aside a certain sum of money from the earnings yearly, but the practice of railways is different. It is the custom with them to renew or replace road bed, track and equipment from year to year as fast as these deteriorate or become worn out, charging the cost directly to working expenses. By these means the whole plant is kept up to its standard at the expense of the earnings, the effect being the same as though specific sums had been set aside from income each year. This method of arranging for depreciation allows the railways to vary the amount of replacement from year to year according as the seasons are prosperous or the reverse. In a good year more may be spent upon the road bed and track and for the purchase of new equipment to replace the old at the cost of working expenses, than perhaps was proportionately required. Then in poor years not so much of this sort of work may be done, allowing a larger pro-

portion of gross income to be payable to bond and stockholders. This saving in the working expenses by a stoppage of repairs to the plant is usually the first resort of the railway manager when pressed for immediate money to pay bond interest. Then there are always demands for new capital for improvements necessary to be made by every railway as its traffic increases. Ordinarily, bonds are sold to meet these capital charges. If, because of a lack of confidence on the part of the investing public, or a lack of credit as regards this particular company, such bonds can not be sold, except perhaps at a great sacrifice, then the management proceed to borrow the necessary money for these capital improvements and perhaps for the then due bond interest. Usually, the company must hypothecate with the bankers from whom the money is borrowed, bonds either of the company itself or such as are held in its treasury and controlling subsidiary lines, important to the integrity of the system, so that the banker's loan may be fully secured. If matters go from bad to worse, if it appear to the lender that the situation of the company is becoming more and more critical so that he is beginning to doubt the real value of the collaterals held by him, he then calls for his money, if it is loaned on demand, or gives notice that he will ask for it when the same matures. If the company can not arrange to borrow the amount from some one else, and if it is confronted with the sale of all its securities at bankrupt prices, the managers may resolve to confess their own insolvency, before a public confession is made by the sale of the securities held by the banker. Perhaps, just at this moment, a large amount of interest is due to bond holders. In such a case the railway managers may choose to default on the bond interest and take the money for payment to the floating debt holders, in order to save for the company the collateral which the bankers may hold, and which may be essential to the control of parts of the system, but which would very likely go for a song if pressed for immediate sale. While, therefore, floating debts do not differ from other obligations of the company except in form, they have come to be recognized in Wall Street as a source of great danger in any period of business

depression or lack of credit. If this money borrowed on demand or on short notice can be funded into bonds having years to run, the company cannot suffer through a demand upon it for the principal, but is safe so long as the interest is promptly paid. This reasoning has led railway companies at times to adopt the plan of selling long time bonds in order to pay off the floating debt, even though the price received should be far below par. But such a course compels the company to pay a very high rate of interest during the whole life of the bonds and is considered such bad financiering that such sales are taken in Wall Street as an acknowledgment that the company is hard pressed—with results to the credit of the corporation almost as bad as though the distress had been openly acknowledged. Under these circumstances "friendly" receivers are asked for so that interest may be withheld from the bond holders and used to take up the obligations of the company immediately pressing, particularly in cases where a failure to meet those obligations would entail severe losses upon the system for all time.

The court appointing receivers, thus asked for, usually stipulates that debts incurred in the operation of a road for six months shall be paid by the receivers. At first blush it would appear that such an order entails hardship upon the creditors of the company, yet upon examination it will be found to be equitable. Transportation is conducted as a cash business. Travelers and shippers are required to pay their money down before taking their journey or receiving their property. Since a railway must be run in the interest of the general public, and since this involves the theory that its working expenses must be paid, it is clear that the expenses of to-day are properly chargeable to the gross receipts of to-day paid in cash by the patrons of the road. But as we have seen, in periods of distress, the managers in order to postpone a confession of bankruptcy in the hopes that the temporary trouble may be tided over, begin to put off payments for wages or for coal, rails, ties and supplies of all descriptions which they may continue to buy, because necessary for the continued operation of the trains. In this way, at the date of appointment of

receivers, every bankrupt road has large arrears of wages and accounts to be made up. As these current obligations are really chargeable to the receipts of the several months past, and as these receipts have been taken to pay bond interest or for other purposes in the interest of the bond holders, it is proper that the prior claims for current expenses should be made up from the first receipts of the road under the receivership. If there is any complaint to be made on the part of the bond holder it is that the knowledge of these facts has not been brought to their attention; but usually in such a matter the managers of the road act in good faith, in the hopes that better times may enable them to pay up the back debts, and save the indirect losses to the bond holders, which a public confession of the real situation would at that time have caused.

The heavy expenses confronting the receivers at the time of their appointment are met partly from defaulted bond interest and perhaps from receivers' certificates. At first these certificates, made a first lien on the property, were authorized very sparingly by the courts and only in cases shown beyond dispute to be necessary. Gradually such issues were extended, until the present practice is for authorization of certificates for any purpose which the court may be led to believe is for the ultimate benefit of the road. In this way another mortgage is put ahead of the regular mortgage, whose bonds, held by the public, have been supposed and declared to be a prior lien upon the road. The force of circumstances often thus impairs the rights of existing mortgages though these be drawn in strong legal language. Foreclosure is also a right expressly granted by the mortgaging company to the holders of its bonds if in default, but in practice this right is subject to modification. It should be recollected that a railway plant, costing perhaps \$50,000 per mile, is worth but a fraction of that sum in itself as real estate and old iron. What is really mortgaged is the income received from transportation. If that income is reduced from business causes, the value of the company's bonds is correspondingly reduced. As just said, the directors, at the first appearance of a decline in profits, economize in depreciation expenses, hoping for better times.

number of shareholders : *White v. The Syracuse, etc., R. R. Co.* (1853), 14 Barb. (N. Y.) 559.

Where no power has been reserved to the State to sanction such a use of corporate funds, a stockholder may sometimes, by his failure to object at the proper time, estop himself from afterwards complaining: *MacIntosh v. Flint, etc., R. R. Co.*, 34 Fed. Rep. 582.

In *Zabriskie v. The Cleveland, etc., R. R. Co.*, 23 How. (U. S.) 381, the complainant, who was a stockholder in the defendant company, was present by proxy at a meeting at which it was agreed to guarantee the bonds of another company. No objection was made in his behalf. It was held he could not complain after some of the guaranteed bonds had been sold.

So, in *Hill et al. v. Nisbet et al.*, 100 Ind. 341, persons who constituted a majority of the directors, when the purchase of stock was made, were held to have no standing in equity to question the validity of such purchase.

It is possible that a right of action which might arise out of the relations of such companies could not be enforced : *Thomas v. R. R. Co.*, 101 U. S. 71.

Should all the shareholders unite and authorize the use of the company's funds for the purchase of stock in another road, the State may, at any time, interfere and compel its sale or deprive the company of its charter: *Mathews v. Murchison* (U. S. C. C., N. Car., E. Dist.), 9 Am. & Eng. R. R. Cas. 590.

A shareholder in a company, whose stock has been bought by a rival company, can enjoin the rival company from voting on the shares held by it at a meeting of his company : *Pearson v. Railroad* (1883), 62 N. H. 537.

And this rule is equally applicable, if not stronger, where the power to vote has alone been purchased: *Woods v. The Memphis, etc., R. R. Co.* (Ala.), 5 Ry. & Corp. L. J. 372; *Haven v. New York, etc., R. R. Co.*, 19 Abb. N. Cas. 456. See *contra*: *Mathews v. Murchison*, 9 Am. & Eng. R. R. Cas. 590.

But such stockholders cannot complain because of the mere taking title to and holding of the stock and the collection of

dividends as they may accrue. It is only where the company seeks to vote upon the stock and thereby control the corporation that they are prejudiced: *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20.

State statutes have in several instances been declared to empower a railroad corporation to hold the stock of another: *Zabriskie v. R. R. Co.*, 23 How. (U. S.) 381.

Section 3951, R. S. 1881 of Indiana, authorizes any railroad corporation organized, under the provisions of the general railroad law, "to acquire, by purchase or contract, the road, the road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect its line. In *Hill et al. v. Nisbet et al.*, 100 Ind. 341, this provision was regarded as sufficiently broad to empower a purchase of stock in an intersecting road. Mr. Justice Mitchell, speaking for the court, said: "If in any case it should appear to be a necessary or reasonable means to acquire the franchise of an intersecting railroad company, and by the averments in the complaint, the purpose for which the stock was purchased may be fairly inferred, no reason is perceived why it might not be accomplished by purchasing the stock instead of purchasing the corporate property directly."

Where extraordinary circumstances arise the common law rule may not be enforced. A railroad company may, without express authority, acquire stock in another corporation in satisfaction of a debt or by way of security for a claim which is in danger of being lost, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss: *Hodges v. New England Screw Co.*, 1 R. I. 312; *Pierson v. R. R.*, 62 N. H. 537; *Woods v. The Memphis, etc., R. R. Co. (Ala.)*, 5 Ry. & Corp. L. J. 372; *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20.

Having obtained the stock it may collect the dividends: *Woods v. Memphis, etc., R. R. Co. (Ala.)*, 5 Ry. & Corp. L. J. 372; *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20.

In *Elkins v. R. R. Co.*, 36 N. J. Eq. 233, a shareholder filed a bill in equity to prevent the sale of 800 shares of stock

of another railroad, claiming that by so doing they would depreciate their road and deprive it of its influence in the other company. The stock had been obtained in exchange for iron rails which they had ceased to use. It appeared the directors, believing it to be for the benefit of their road, had authorized the sale to be made by their president at a price shown to be its market value by a public sale of part of it. The court declined to interfere.

A corporation cannot, by a simulated compliance with the provisions of the law, subscribe for stock through its agents or employes. In the case of the Central R. R. Co. v. The Penna. R. R. Co., 36 N. J. Eq. 475, the National Storage Company, incorporated under the laws of New Jersey, was restrained from laying its tracks across the land and tracks of the Central Railroad Company of New Jersey, because it appeared that the capital stock of the storage company was held in trust for persons owning large interests or largely concerned in the management of the Pennsylvania Railroad Company.

Where the *ultra vires* Act is as yet only in contemplation, it has been urged to induce a court of equity to act, the complainant should show he would sustain irreparable injury. But the courts have answered that they will restrain such an act although it appear to be of material advantage to him: Central R. R. Co. v. Collins, 40 Ga. 582; Elkins v. Camden, etc., R. R. Co., 36 N. J. Eq. 5. Thus the directors may be restrained from borrowing money for an anticipated purchase.

Public policy is often cited as declaring the annihilation of the lesser lines as an evil. That it will result in good is claimed by those desiring to bring the condition about. It was said by the president of one of our trans-continental railroads: "The crystallization of small and local lines, and the absorption of branch roads is viewed with grave popular apprehension, but I cannot regard it as a thing to be dreaded. I am very sure now, as I have been for the last twenty years, and as I long ago expressed myself, that a great consolidated corporation or even a trust can be held to far better

doctrine few of our large railway systems are now placed in any but "friendly" hands. In such cases the matter is all planned out beforehand and the men chosen. Any creditor of the company, friendly to the administration, may allege that the corporation owes him money that it cannot pay, and as every going concern has plenty of creditors in the ordinary course of business, such a convenient creditor is usually not hard to find. To this complaint, usually prepared in secret by some one of the company's officers, a reply confessing the truth of the charge. All parties concerned, each with his respective documents, and without notice to the other creditors or to the public, apply to the judge, perhaps at night, and forthwith grants the application and appoints the receiver already arranged for. That this procedure opens the door to the possibility of great abuse of corporate interest needs no argument. That on the whole the plan has worked fairly well is owing to the high character of our judiciary and also of the officers in charge of our great corporations. Yet it is not reassuring to holders of stocks, bonds, and debt to know that a conspiracy between any small creditor and any one of the principal officers of a corporation can throw the control of the whole property of the corporation into the hands of the court. Unquestionably, the appointment of former officers of the company as receivers is a charge at times that those who had wrecked the company are still left in power. Moreover, the door is open for the difficulty easily thrown in the way of a liquidation into the company's condition, which it is the duty of the old managers to thwart, but which is necessary before an equitable plan of reorganization can be carried out. Yet the affairs of our large corporations have become so complicated that only those long familiar with the intricacies of administering them without losses both to the company and to shippers. This business fact has led to the action of the courts in the appointing

If the decline continues and a receivership ensues, the passing of the property into the hands of the court is an acknowledgment of facts regarding impairment of income which are true though not before generally known. Hence the issue of receivers' certificates commercially represents the impairment of income just referred to, but which at the time was not enforced against the bondholders. Railway mortgages are not sacred because of the strong legal terms in which they are drawn, but are dependent upon success in the business of transportation, differing in this respect from real estate mortgages which rely more upon the prosperity of the whole community. The legal doctrine of certificates is in a state of evolution, with a tendency to approximate its working to the business circumstances. English debentures are not foreclosable, being mortgages upon the railway income only, and thus more truly than American mortgages, represent the real situation. Our practice of railway receiverships is thus a development of our own circumstances and a sort of compromise between the too-strong language of our mortgages and the actual conditions of the business of transportation.

A receiver may decline to pay the rentals due to leased lines or the interest owing on guaranteed bonds if these lines are at the time of the receivership unprofitable, no matter how necessary to the parent company these branches may once have been. But the old contracts are still legally in force against the company, and can be thrown off only by a sale of the franchise and property to a new corporation. Such a sale sometimes would involve a forfeiture of valuable charter rights; and in such reorganizations committees usually try to formulate some plan which shall bring the fixed charges below the minimum profits by allotting the necessary losses among all classes of securities in proportion to their respective values to the system as a whole; a process which does not regard the liens of the mortgages so much as the worth of the lines they cover. But with plans of reorganization, the receiver properly should have nothing to do.

JOHN MARSHALL

BY CHESTER N. FARR, JR.

It is the tenth of June, 1788. We are standing in the gallery of the old Richmond Theatre on Shockoe Hill. The heart of a nation newly born is throbbing feebly, as if struggling for life, in the gathering on the floor below; for it is the ninth day of the session of the Virginia Convention called to ratify or reject our present Constitution of the United States. Around us in the galleries are clustered the fashion, beauty, wealth and intellect of Richmond; nay, from every walk of life, people have left their employments or their pleasures that they may appear at this stirring crisis. Outside through the windows we look at the city stretched out before us, and tinted in the rays of the summer sun of the South. And as the hushed crowd in the auditorium lean forward to catch the speaker's words, with a stillness so profound that the flutter of fans has ceased, the very airs outside have paused in their sportive whirls, and not a twig or leaf rustles. A single beam of the noontide sun, piercing the atmosphere, throws a glittering halo about the head of a figure standing in the rostrum, upon whom all eyes are fixed. A tall, slender, ungainly figure, dressed plainly in a somewhat ill-fitting surtout of blue, is speaking from this place. The clear-cut, impressive features, not handsome, but striking and bronzed with the sun, are upturned to meet the light as if he welcomed this heaven-sent omen of success to the cause for which he is contending.

The black eyes flash with a singular lustre, and the dry, hard voice, drawling and hesitating somewhat at first now speaks with a force as resistless as the thought it conveys, while a single, awkward gesture, a perpendicular sweep of the right arm, cuts the air at intervals.

"John Marshall, the young delegate from Henrico county,"

is whispered near us, and we hear the speaker's voice as he gives utterance to his closing passage.

"The honorable gentleman has told you that your Continental Government will call forth the virtue and talents of America. This being the case, will they encroach upon the power of the State governments? Will our most virtuous and able citizens wantonly attempt to destroy the liberty of the people? Will the most virtuous act the most wickedly? I differ in opinion from the worthy gentleman. I think the virtue and talents of the members of the general government will tend to the security instead of the destruction of our liberty. I think that the power of direct taxation is essential to the existence of the general government, and that it is safe to grant it. If this power be not necessary, and as free from abuse as any delegated power can possibly be, then I say that the plan before you is unnecessary, since it imports not what system we have, unless it have the power of protecting us in time of peace and war."

A hush, a burst of applause, and the orator has taken his seat.

These are the first public statements of John Marshall on the Constitution of the United States. They but foreshadow the great labors which he afterwards performed upon it. As a soldier he had borne arms in defence of the country of its adoption; as a legislator he had contended for its ratification; as a diplomat he was to fling back with dignified scorn the insults levelled at it by the Empire of France, and finally, at the summit of his professional glory, as Chief Justice of the Supreme Court of the United States for thirty-four years, he built up, perfected and expounded this same Constitution through a series of decisions unparalleled in the annals of jurisprudence.

We are burning now, in our peace, our happiness, our prosperity and our liberty, the stored sunshine of the intellects who nourished our republic in its inception. Their powers were at work, perfecting secret forces, to act not for a day, a decade, but for all posterity. Not to patch a piece of mechanism that it might deal a few stirring strokes and then im-

tently fail, nor to flash out a shower of the glittering sparks of political pyrotechnics leaving the surroundings in intenser darkness when their glow had expired. They worked slowly but they worked truly. They fashioned despite popular clamor and opprobrium. Doubtless they saw in the distance the Promised Lands which their work would develop and perfect, whose waters they might not taste and whose air they might not breathe, and yet they faltered not. And among these men to none do we owe a greater debt, and to none has less of that debt been paid than to John Marshall.

The mistaken notion that much of the value of Marshall's services is a merely technical value has led the popular mind to place him in that category of vague personalities whom we praise with the pleasing indefiniteness born of ignorance of the work which he has accomplished. And yet a theoretical exposition of a national government, crude of necessity, discussed under his hands, became a complete and rounded whole. Statements so general as those contained in the Constitution of the United States, are necessarily susceptible of a varied construction. To define all these, to limit their maximum and minimum effect, in practical application was the work performed by Marshall. The Constitution, a shadowy vision of political theories, grand, indeed, to behold, but intangible and elusive, became under his hands, a living breathing entity.

In the mentality which availed to perform this work, we have a mind that in its peculiar field has not been paralleled in the history of this country. "Aim," said Marshall, "exclusively at strength." He did not wish to obscure by rhetoric or retard by descensive bursts of eloquence the attainment of the object he had in view. He felt that the field in which he labored was one that could not be cultivated by a display of the mental graces, but only by the sturdier qualities of sinewy reasoning. Nor was the faculty which destroys but does not create, which uproots the weeds, mayhap, but leaves behind a barren and sterile field, a faculty which dominated the mind of Marshall. He would not attempt to raze an unsightly building to the ground, unless he was prepared to

remove the ruins or erect in its stead some worthier structure. The impassioned denunciations uttered by Henry against the Constitution that "squints horribly," that "squinted towards monarchy," and the attempts of the latter and the Jeffersonian anti-Federalists to fetter the Federal Government, and to clip its claws, Marshall met with the weapons of weighty logic so thoroughly at his command. Upon the power of these weapons his contemporaries looked with an admiration universally expressed, and admixed with fear when they faced them. Said Daniel Webster, "when the Chief Justice says, 'it is admitted,' I am prepared, for a bomb that will demolish all my points."

This close, remorseless logic was pitted against qualities which appeal to the passions and not the reason of men, and these qualities the best of their time, again and again, and it never failed. The fervid eloquence of Henry, the rich imagination of Wirt, and the graceful and pleasing oratory of Campbell all fell before the overwhelming logic of Marshall. And we must remember that this logic had the incumbrances of an ungraceful delivery and an ungainly figure, and that the triumphs were achieved under circumstances in which the passions of men were most easily moved and their judgments most readily swayed by the tumult of their emotions. Strong, indeed, must have been that power of reasoning, which, under conditions so adverse, could have proved an invariable victor. And as we examine it we are struck with its exceptional clearness.

Indeed, the acts or thoughts of genius are essentially clear and simple. Complications may be readily devised by the baser ability of cold talent. But the formulæ conveying ideas which found empires or establish systems of social or economic polity, have no distortion or opacity. So simple are these thoughts that when revealed to us they startle us with their self-evident truth, and half incline us to believe that we have always been aware of their existence. No laws are so simple as those governing the apparently complex workings of nature, no formulæ so easy of comprehension as those which express them. A simple system, expressed in a single

nment and undergone important changes since the previous publication of the work—that of business combinations and “trusts.” The question is treated very clearly, though briefly, finding a place in the work from its relation to partnership law rather than for the purpose of discussing its depths, interesting and important though they undoubtedly are. This chapter first describes a few of the present more important “trusts,” and shows the objects of their custom and their nature legally considered. The question of illegality is then taken up, and, as regards the cases to which corporations are parties, a distinction drawn between the violation of, or departure from, charter rights, and the more interesting and less well-defined ground of “public policy.” A list of the various State “anti-trust” acts is added in a note and a brief mention of the extent to which they have gone.

The editor remarks in his preface that “much of the discussion in the first and fifth chapters” (of the previous edition) “was rendered unnecessary by *Cox v. Hickman*.” The mercantile conception has, he says, become the legal conception as well. On page 41, chap. 5, the partnership character is discussed.

Mr. Beale has not hesitated to make liberal use of his office as regards the treatment of the notes. We find, however, that the changes are improvements, and such is surely the province of the editor.

A useful appendix of forms for partnership agreements (and disagreements) is added. The book has throughout been divided into sections, following the present almost universal custom. Text books are usually consulted, not read continuously, and some sort of heading to the various subjects are necessary.

W. S. E.

The Editors announce that the following *erratum* has been brought to their attention: Page 69, 2d column, 4th line of the January number, 1894 (Vol. I, N. S., No. 1), after the words “upon the discretion of a last trustee,” *insert* “or being given in perpetuity.”

THE
AMERICAN LAW REGISTER
AND
REVIEW.

JUNE, 1894.

THE COMMERCIAL BASIS FOR RAILWAY
RECEIVERSHIPS.

By THOMAS L. GREENE.

During the year 1893 there were placed in the hands of receivers 76 railway companies, small and large, owning 29,380 miles of line and representing stocks and bonds to the amount of \$1,754,806,000, being one-sixth of the railway mileage and one-sixth of the railway capital of the country. These figures of capitalization do not include car trust notes, floating debts or other liabilities, which would add considerably to the total. At present about one-fourth of the entire railway mileage of the country is being operated by these officers of the courts.

These large figures suggest at once the importance which the question of railway receiverships has assumed of late through the inability of railway companies to meet their obligations. The practice of operating insolvent railways through court officers appointed for the purpose is not yet definitely settled either as to the methods of working or as to the legal doctrines involved, the whole matter being yet in a state of evolution. It is the boast of our law that it changes to meet the changing demands of commerce, as business becomes more complex and the rules governing it necessarily more

involved; so as regards railway receiverships our present situation is the result of a compromise between the terms of railway mortgages and the commercial conditions under which railway operations are carried on.

The original idea of appointing a receiver to take charge of the property of a firm or individual was that the business might be wound up with as little delay as possible and the assets sold and distributed to the creditors in some equitable proportion. As corporations became more common, taking the place of firms and individuals, the same idea was applied to them when insolvent. They were placed in the hands of receivers in order that their affairs might be closed up with the least possible delay by dividing the assets among the creditors in the proportion to which it was shown they were entitled. It was inevitable that the question of the proper method of treating insolvency among railway companies should arise. From small beginnings the number of miles of railway in the United States increased rapidly until now, judged by the magnitude of the property invested and the amount of business done, the railways form perhaps our largest industry, certainly one of the most complex. Through one cause or another it was inevitable that bankruptcy should increase among these rail carriers as their mileage increased; and in such cases also it was natural, as in the cases of firms or small corporations, that receivers should be appointed pending a settlement of the insolvent debtor's affairs. But here a new question arose. A trading firm or corporation unable to pay its debts could be wound up and its assets distributed to its creditors without loss to the community. Other traders could take their places and business would go on as before; but it was otherwise with the railways. It was quickly seen that great states and sections of states dependent upon the continued operation of these railways for the transaction of their every day business, for supplies of clothing and manufactured goods and even for meat and bread. Whatever the outcome the trains must be kept running. Since, in the course of time, local railways had grown into systems, it was found that the interests involved in these systems were so enormous that their combined assets

could not easily be sold as one parcel to any one person or company, or sold separately without breaking up the systems. Hence, until the serious questions of reorganization or sale were settled, the receivers of these systems must continue to run the trains in the interest of the public. As these necessary adjustments were often found very complicated, requiring a long time for negotiations and final agreement, the receivers appointed by the courts were placed for the time being in the position of railway managers. They were confronted with technical problems of much practical importance. They were required to become familiar with disputed questions concerning reasonable rates and their ramifications. The conflicting claims of cities and towns as to charges which should be relatively fair to each were pressed upon their attention. In short, it was required that receivers should be able to formulate for the operation of the properties in their charge a policy which should be equitable to the capitalists whose money was invested in the road, to all the sections served by the railway and to the general traveling and shipping public. Needless to say the success of such a task required men of administrative ability with the further result that the courts through their appointed officers were obliged to decide upon the details of administration.

It was the practice at first for receivers to be asked for solely by the creditors of the company in order that their property might be held together and protected against the seizure of certain parts of the system, particularly against creditors who might destroy the value of the property as a whole. Usually the corporation appeared before the court in opposition to the motion so that, if receivers were appointed at all, the court acted upon information brought to its knowledge after a severe legal struggle. The idea that the corporation itself could ask for an appointment of a receiver for its own property originated with the late Jay Gould, whose contention in the Wabash cases in this respect was afterwards affirmed by the Supreme Court of the United States, which held that a company could itself ask for the protection of the court if such was for the best interest of all concerned. Under this

behind the hills in his fiery splendor, with his bright beams lying athwart the landscape and flashing upward like the golden lances of a serried square, and in this most noble of spectacles, forgetting the oppressive burden and heat with which we had reviled his disc at noonday, we gaze half regretfully at his expiring glories. Something of a prayer breathed that we may atone on the morrow for this day's ingratitude to the great life-giver; a morrow that too often we may not see. And thus when the heat of party strife and faction has passed away, the people hasten to the death bed of a masterful intellect too late, indeed, to accord an earthly satisfaction to a soul now freed from worldly trammels, but yet to breathe their prayers of atonement and their wishes for another life that can never come. The pomp and pageantry of a solemn funeral, the glowing tribute of eloquent eulogies, the sculptor's chisel and the painter's brush may all be invoked as a sacrifice in propitiation, and as a symbol branded deep in history, of past neglect, of ingratitude when living.

The true greatness of Marshall could not be appreciated during his lifetime, only the eye that could scan futurity could behold the fruition of his work. Only the eye trained to prophetic vision could have seen each constitutional fibre of our National Government knit tighter together with each succeeding year, or perceive how each plank in the ship of State fashioned by his hand, would cling closer to its fellow, only seasoned and hardened by use, until a government based on political liberty should float through the mightiest surges of time, scathless, enduring, a model for posterity.

And even the glory accorded the dead, has not yet been given in its proper fulness to Marshall. His name stands with thousands of people as a name and nothing more. He yet needs a memorial, other than that which he himself has wrought, not carved in perishable marble or limned in fading color, nor made of the breath of oratorical vamping, but sketched in living words, a biography, written by a master hand, and woven in the undecaying fabric of the English tongue.

NOTE.—The above address was delivered by Chester N. Farr, Jr., of the Philadelphia Bar, at the recent Commencement of the University of Pennsylvania.

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FISHER v. FISHER.¹ APPELLATE COURT OF INDIANA.

Dealing in Futures—Delivery—Validity of Contract—Evidence.

When there is evidence that the defendant and his cousin bought a quantity of wheat through reputable members of the Chicago Board of Trade, which was delivered to them in the form of warehouse receipts; that actual delivery on demand was intended by all parties, and that they could have got the wheat on demand; that they carried it a while on margin with said dealers; that wheat depreciated, and they closed out at a loss, which was all paid by the cousin, defendant giving him the note in suit in settlement of his share—in view of these facts a finding that the note was not founded on a gambling consideration will not be reversed.

FUTURES.

No gambling device has ever afforded the votaries of fortune such opportunities or such incentives as the invention of "future" contracts; and at no time in the history of the world has gambling been carried to such ruinous excess. The tales of old-world extravagance and of ante-bellum recklessness fade into obscurity beside the millions that are staked on a single deal in wheat or corn; and no mania for cards could ever have wrought the widespread loss and suffering due to the cold-blooded manipulations of a Gould or of a Fisk. But the effects of such dealings belong to the domain of economic science; the law is only concerned with their validity.

The forms of these contracts are as numerous as the condi-

¹ Reported in 36 N. E. Rep. 296.

tions of human affairs; and their variety is bewildering to any one not to the manner born—or at least bred. Starting with a simple "option" (to buy or to sell) we are soon introduced into a labyrinth of "puts" and "calls," sales "short" and "long," and the like, until we reach the highest development of the stock gambler's inventive genius in the famous "straddle," that marvelous machine designed to rescue the unhappy operator from being impaled on either horn of a dilemma—though having a peculiar tendency to transfix him with both. But whatever the name, and whatever the outward form, a "future" contract means substantially a contract to buy or to sell, or to deliver or to receive commodities at some future time.

1. A contract to buy or to sell goods, the execution of which is postponed to some future time, is not necessarily invalid, even though the goods are not in the possession of the vendor, nor has he contracted to procure them from another, nor has any reasonable expectation of becoming possessed of them by the time appointed, otherwise than by purchasing them after the contract is made: *Hibblewhite v. McMorine*, 5 M. & W. 462; *Ashton v. Dakin*, 4 H. & N. 867; *Bartlett v. Smith*, 13 Fed. Rep. 263; *White v. Barber*, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221; *Bibb v. Allen*, 149 U. S. 481; S. C., 13 Sup. Ct. Rep. 950; *Wolcott v. Heath*, 78 Ill. 433; *Fixley v. Boynton*, 79 Ill. 351; *Logan v. Brown*, 81 Ill. 415; *Cole v. Milmine*, 88 Ill. 349; *Appleman v. Fisher*, 34 Md. 540; *Williams v. Tiedemann*, 6 Mo. App. 269; *Cassard v. Hinman*, 1 Bosw. (N. Y.) 207; *Tyler v. Barrows*, 6 Robt. (N. Y.) 104; *Kingsbury v. Kirwin*, 43 N. Y. Super. Ct. 451; *Kahn v. Walton*, 46 Ohio St. 195; S. C., 20 N. E. Rep. 203; *Brua's App.*, 55 Pa. 294; *Smith v. Bouvier*, 70 Pa. 325. Nor is a future sale, with the privilege reserved on either side to execute the contract or not, necessarily an illegal contract. "The vendee of goods may expect to produce or acquire them in time for a future delivery, and while wishing to make a market for them, is unwilling to enter into an absolute obligation to deliver, and therefore bargains for an option which, while it relieves him from liability, assures

him of a sale, in case he is able to deliver, and the purchaser may in the same way guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods. There is no inherent vice in such a contract:" *Bigelow v. Benedict*, 70 N. Y. 202; S. C., 26 Am. Rep. 573; *Brown v. Hall*, 5 Lans. (N. Y.) 177; *Perryman v. Wolfe*, 93 Ala. 290; S. C., 9 So. Rep. 148; *Kirkpatrick v. Bonsall*, 72 Pa. 155; *Maxton v. Gheen*, 75 Pa. 166. It makes no difference that the transaction is a speculative one: *Stewart v. Parnell*, 147 Pa. 523; S. C., 29 W. N. C. 537; 23 Atl. Rep. 838. If the intention of the parties is to execute the contract, in case the option is exercised, by an actual delivery and receipt of the subject matter, the contract is valid: *Sondheim v. Gilbert*, 117 Ind. 71; *Rumsey v. Berry*, 65 Me. 570; *Farnum v. Pitcher*, 151 Mass. 470; S. C., 24 N. E. Rep. 590; *Jones v. Shale*, 34 Mo. App. 302; *Noyes v. Spaulding*, 27 Vt. 420. The delivery need not be manual; it may be symbolical, by means of warehouse receipts, bills of lading, or the like: *Fisher v. Fisher* (Ind.), the principal case, 36 N. E. Rep. 296; *Farnum v. Pitcher*, *supra*; *Gregory v. Wendell*, 39 Mich. 337.

II. If, however, there is no actual delivery intended, but the transaction is to be settled by the payment of the difference between the market price and that fixed by the contract, this amounts in legal effect to a mere wager on the price of the goods, and the contract is accordingly held void, at common law, as well as by statute in many States. "Such contracts are against public policy, because they tend to unsettle the natural course of trade, and tempt the parties to them to work for a rise or fall in the prices of the commodities on which their wagers are laid, without regard to actual values, and by methods calculated to promote their own profit at the expense or ruin of others, without reciprocity of benefit. And, besides these evils, there are others, more immediate to the parties, culminating from time to time in loss of fortune and character, defalcations, crime and domestic misery, evils which, though they do not always follow, yet follow so often that they have not been overlooked by the courts:" *Flagg v. Gilpin*, 17 R. I. 10; S. C., 19 Atl. Rep. 1084; *Grizewood v. Blane*, 11 C. B. 525;

Barry v. Croskey, 2 J. & S. 1; Bartlett v. Smith, 13 Fed. Rep. 263; Embrey v. Jamison, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; Cobb v. Prell, 16 Cent. L. J. 453; Justh v. Holliday, 17 Cent. L. J. 56; Lee v. Boyd, 86 Ala. 283; S. C., 5 So. Rep. 489; Pickering v. Cease, 79 Ill. 328; Cothran v. Ellis, 125 Ill. 496; S. C., 16 N. E. Rep. 646; Watte v. Costello, 40 Ill. App. 30; Beadles v. McElrath, 85 Ky. 230; Rumsey v. Berry, 65 Me. 575; Gregory v. Wendell, 39 Mich. 337; Waterman v. Buckland, 1 Mo. App. 45; Cockrell v. Thompson, 85 Mo. 510; Rudolf v. Winters, 7 Neb. 125; Yerkes v. Salomon, 11 Hun. (N. Y.) 471; Peck v. Doran, 46 Hun. (N. Y.) 454; Story v. Salomon, 71 N. Y. 420; Williams v. Carr, 80 N. C. 294; Lester v. Buel (Ohio), 30 N. E. Rep. 821; Brua's App., 55 Pa. 294; North v. Phillips, 89 Pa. 250; Oliphant v. Markham, 79 Tex. 543; S. C., 15 S. W. Rep. 569; Everingham v. Meighan, 55 Wis. 354; S. C., 13 N. W. Rep. 269; Lowry v. Dillman, 59 Wis. 197.

A future contract is not illegal, however, merely because it is in fact settled by the payment of differences. It is the original intent of the parties that governs; and if that be for a *bona fide* execution of the contract by delivery, even though contemplating the possibility of a settlement by way of adjusting differences, the contract is valid in its inception, and either party may waive his right to actual execution, and make a settlement on the basis of differences in price, which will not render the contract void: Clarke v. Foss, 7 Biss. C. Ct. 540; Boyd v. Hanson, 41 Fed. Rep. 174; Univ. Stock Exch. v. Stevens, 66 L. T. N. S. 612. The existence of the illegal intent is not necessarily to be inferred from the final settlement: [though it would seem to be a strong indication of it]: Ware v. Jordan, 25 Ill. App. 534; see Porter v. Viets, 1 Biss. C. Ct. 177.

Similarly, the fact that the transaction was carried on through a broker, by means of margins furnished him to secure him against any loss which he might suffer on his principal's account, is not an infallible sign of a wagering contract. The intent to deliver may exist in such a case, and the margin may be demanded only as an earnest to secure the delivery of

the goods, or the payment of the purchase price: *Preston v. R. R.*, 36 Fed. Rep. 54; *Union Nat'l Bk. v. Car.*, 16 Cent. L. J. 320; *Fisher v. Fisher*, 113 Ind. 474; S. C., 15 N. E. Rep. 832.

III. In order to invalidate a future contract, the illegal intent must be mutual: *Connor v. Heman*, 44 Mo. App. 346. If either party intends a *bona fide* execution, the contract is good as to him, and will be enforced at his suit. The secret intention of the other party cannot affect his rights: *Clarke v. Foss*, 7 Biss. C. Ct. 540; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Bangs v. Hornick*, 30 Fed. Rep. 97; *Lehman v. Feld*, 37 Fed. Rep. 852; *Edwards v. Hocffinghoff*, 38 Fed. Rep. 635; *Boyd v. Hanson*, 41 Fed. Rep. 174; *Fixley v. Boynton*, 79 Ill. 351; *Carroll v. Holmes*, 24 Ill. App. 453; *Benson v. Morgan*, 26 Ill. App. 22; *Wheeler v. McDermid*, 36 Ill. App. 179; *Whitesides v. Hunt*, 97 Ind. 191; *Murry v. Ocheltree*, 59 Iowa, 435; S. C., 13 N. W. Rep. 411; *Gregory v. Wendell*, 39 Mich. 337; *Williams v. Tiedeman*, 6 Mo. App. 269; *Cockrell v. Thompson*, 85 Mo. 510; *Hentz v. Miner*, 64 Hun. (N. Y.) 636; S. C., 18 N. Y. Suppl. 880; *Williams v. Carr*, 80 N. C. 294; *Wall v. Schneider*, 59 Wis. 352; *Ashton v. Dakin*, 4 H. & N. 867.

IV. In consequence of the manner in which these transactions are now carried on through the medium of Exchanges and Boards of Trade, it very rarely happens that a future contract is made directly between the parties. It is usually effected through the medium of a broker employed for that purpose; and this introduces a new element for consideration, viz.: whether the broker, thus employed, is to be viewed as a mere agent, unaffected by the illegal intent of the parties, or whether he is so far affected by that intent as to be precluded from recovering advances and commissions on account of such contract.

The rule in England, as laid down in *Thacker v. Hardy*, 4 Q. B. D. 685; S. C., 27 W. R. 158, seems to be, that the broker, even with knowledge of the customer's illegal intent, is merely the agent of the latter; and that as there is no agreement between him and the customer to buy or sell, there is no illegality in his employment, and he can recover advances and

commissions : *Rosewarne v. Billing*, 15 C. B. N. S. 316; see, however, *Cooper v. Neil*, U. N., 1878, p. 128. But in America the far more reasonable rule is adopted that "when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction : " *Irwin v. Williar*, 110 U. S. 499; S. C., 4 Sup. Ct. Rep. 160; *Embrey v. Jamison*, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; *Re Green*, 7 Biss. C. Ct. 338; *Phelps v. Holderness*, 56 Ark. 300; S. C., 19 S. W. Rep. 921; *Walters v. Comer* (Ga.), 5 S. E. Rep. 292; *Bk. v. Cunningham*, 75 Ga. 366; *Cothran v. Ellis*, 125 Ill. 496; S. C., 16 N. E. Rep. 646; *Wheeler v. McDermid*, 36 Ill. App. 179; *Stewart v. Schall*, 65 Md. 289; *Harvey v. Merrill*, 150 Mass. 1; S. C., 22 N. E. Rep. 49; *Hill v. Johnson*, 38 Mo. App. 383; *Crawford v. Spencer*, 92 Mo. 498; *Kahn v. Walton*, 46 Ohio St. 195; S. C., 20 N. E. Rep. 203; *Lester v. Buel* (Ohio), 30 N. E. Rep. 821; *Fareira v. Gabell*, 89 Pa. 89; *Dickson v. Thomas*, 97 Pa. 278. One who deals with a broker deals with him as a principal, not as an agent: *Ruchizky v. De Haven*, 97 Pa. 202. It does not matter that some of the parties with whom the broker dealt were actual buyers and sellers. The illegal intent pervades the whole course of dealing: *Fareira v. Gabell*, 89 Pa. 89; *Miles v. Andrews*, 40 Ill. App. 155. The question is purely between the broker and the customer, and his dealings with third parties are immaterial on the question of the understanding between them: *Griswold v. Gregg*, 24 Ill. App. 384; *Kennedy v. Stout*, 26 Ill. App. 133; *Miles v. Andrews*, 40 Ill. App. 155.

Two cases only appear to favor the English rule: *Taylor v. Penquite*, 35 Mo. App. 389, which rests on a mistake as to the decision in *Cockrell v. Thompson*, 85 Mo. 510; and *Barnes v. Smith* (Mass.), 34 N. E. Rep. 403, which seems to cling to the idea that the broker is the agent only of the customer; but these are of no weight against the preponderance of authority cited.

If, however, the broker is ignorant of the illegal design of

his customer, and acts in good faith, the contract is good as to him, and he can recover his advances, commissions and losses: *Rountree v. Smith*, 15 Repr. 609; *Irwin v. Williar*, 110 U. S. 499; S. C., 4 Sup. Ct. Rep. 160; *Lehman v. Feld*, 37 Fed. Rep. 852; *Edwards v. Hoefflinghoff*, 38 Fed. Rep. 635; *Boyd v. Hanson*, 41 Fed. Rep. 174; *Murry v. Ocheltree*, 59 Iowa, 435; S. C., 13 N. W. Rep. 411; *William v. Carr*, 80 N. C. 294; *Potts v. Dunlap*, 110 Pa. 177; S. C., 20 Atl. Rep. 413.

V. As the intent of the parties is the criterion of the nature of the contract, anything which goes to show that intent is admissible as evidence in a suit founded on the contract: *Yerkes v. Salomon*, 11 Hun. (N. Y.) 471; *Cassard v. Hinman*, 6 Bosw. (N. Y.) 14; *Hentz v. Miner*, 58 Hun. 428; S. C., 12 N. Y. Suppl. 474. All the circumstances surrounding the transaction, and the conduct of the parties with reference to it, are legitimate evidence on this question: *Boyd v. Hanson*, 41 Fed. Rep. 174; *Hill v. Johnson*, 38 Mo. App. 383. The general course of dealing between the parties is some evidence, though not conclusive, of the nature of the transaction in question: *Watte v. Costello*, 40 Ill. App. 307; *Lower v. Young*, 59 Iowa, 364; S. C., 13 N. W. Rep. 329; *Kenyon v. Luther*, 4 N. Y. Suppl. 498; S. C. aff., 10 N. Y. Suppl. 951. And so is the general course of dealing of the Board or Exchange, of which the broker is a member: *Beveridge v. Hewitt*, 8 Ill. App. 467. But it is not allowable to give in evidence special instances of illegal transactions, either with the party to the contract, or with third persons: *Gruner v. Stucken* (La.), 3 So. 338; *Dwight v. Badgley*, 60 Hun. (N. Y.) 144; S. C., 14 N. Y. Suppl. 498; *Potts v. Dunlap*, 110 Pa. 177; S. C., 20 Atl. Rep. 413. Even the subsequent acts of the parties may be evidence of their original intent: *Clarke v. Foss*, 7 Biss. C. Ct. 540.

The rules of the Board or Exchange on whose floor the dealings are carried on are admissible on the construction of the contract: *Bartlett v. Smith*, 13 Fed. Rep. 263; *Bibb v. Allen*, 149 U. S. 481; S. C., 13 Sup. Ct. Rep. 950. When the rules provide that if further margins are not put up on notice, the

contract may be treated as filled, and the other party may recover the difference between the contract and market price, without any performance or offer to perform on his part, they will make a contract good on its face illegal and void: *Lyon v. Culbertson*, 83 Ill. 33; S. C., 25 Am. Rep. 349. But if the illegal intent be otherwise proven, the rules cannot be invoked to show that, according to them, actual delivery must be made: *Mackey v. Rausch*, 60 Hun. (N. Y.) 583; S. C., 15 N. Y. Suppl. 4.

The ability of the parties to perform their contracts is a very material circumstance; for if their means are wholly disproportioned to the value of the goods purchased, the inference is strong that the transaction is not *bona fide*: *Beveridge v. Hewitt*, 8 Ill. App. 467; *Curtis v. Wright*, 40 Ill. App. 491; *Myers v. Tobias* (Pa.), 16 Atl. Rep. 641; S. C., 24 W. N. C. 432; *Gaw v. Bennett*, 153 Pa. 247; S. C., 31 W. N. C. 557; 25 Atl. Rep. 1114; *Watte v. Wickersham*, 27 Neb. 457; S. C., 43 N. W. Rep. 259. It has also been held that when the sum deposited with the broker bears no proper proportion to the value of the stock ordered, the inference is that a gambling contract was intended; but this is hardly consonant with the weight of authority: *Patterson's App.* (Pa.), 13 W. N. C. 154.

When the evidence showed that the brokers were willing to buy or sell for the customer at their own risk without inquiry as to his financial ability, so long as he put up the necessary "margins;" that when he failed to advance further funds, the brokers, without offering to deliver or demanding the price of the cotton, promptly closed out the contract and demanded the difference between the contract and market price, the facts show a gambling contract: *Phelps v. Holderness*, 56 Ark. 300; S. C., 19 S. W. Rep. 921. So, evidence that the customer was not a refiner of oil, or one who would buy for his own consumption; that he had not sold the oil when he exercised his option; that he did not intend to exercise it if the market price fell below that fixed in the agreement, joined to proof that he was financially unable to take and pay for the whole amount of oil he had contracted for, leads to the conviction

that the contract was a gambling one : *Kirkpatrick v. Bonsall*, 72 Pa. 155. But when the customer pays a part of the purchase price, leaves stock with the broker till paid for, and directs him to sell it again, the contract is valid : *Eggleston v. Rumble*, 66 Hun. (N. Y.) 627 ; S. C., 20 N. Y. Suppl. 819. And when the wheat purchased is delivered in the form of warehouse receipts, which would entitle the purchasers to actual delivery of it on presentation thereof, the transaction is good : *Fisher v. Fisher*, the principal case (Ind.), 36 N. E. Rep. 296.

Ordinarily, the burden of proof lies on the party asserting the illegality of a contract good on its face : *Benson v. Morgan*, 26 Ill. App. 22 ; *Mohr v. Mieser*, 47 Minn. 228 ; S. C., 49 N. W. Rep. 862 ; *Harris v. Tumbridge*, 83 N. Y. 92. But though an illegal intent will not be presumed : *Story v. Salomon*, 71 N. Y. 420 ; yet experience has so proved the likelihood of illegal intent in future contracts, that the tendency seems now to be to put the burden of proof on the one who seeks to enforce the contract, at least when a doubt has been cast upon it by the testimony of the opposite party : *Wheeler v. McDermid*, 36 Ill. App. 179 ; *First Nat'l Bk. v. Oskaloosa Co.*, 66 Iowa, 41 ; S. C., 23 N. W. Rep. 255 ; *Sprague v. Warren*, 26 Neb. 326 ; S. C., 41 N. W. Rep. 1113 ; *Cobb v. Prell*, 16 Cent. L. J. 453 ; *Barnard v. Backhaus*, 52 Wis. 593.

VI. In Illinois, the statute against dealing in futures is peculiarly strict. "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold . . . shall be fined . . . and all contracts made in violation of this section shall be considered gambling contracts, and shall be void : " Cr. Code Ill., § 130. It is the rule under this statute that any future contract, other than an actual sale, is void : *Webster v. Sturges*, 7 Ill. App. 560 ; *Locke v. Fowler*, 41 Ill. App. 66 ; *Schneider v. Turner*, 130 Ill. 28 ; S. C., 22 N. E. Rep. 497 ; *Aff. S. C.*, 27 Ill. App. 220 ; *Pearce v. Foote*, 113 Ill. 228 ; *Corcoran v. Coal Co.*, 138 Ill. 390 ; S. C., 28 N. E. Rep. 759 ; but see *Richter v. Frank*, 41 Fed. Rep. 859. The same seems to be the rule in Iowa : *Osgood*

v. Bauder, 82 Iowa, 171; S. C., 47 N. W. 1001. This, however, applies to optional sales only. If the sale be absolute, and the delivery only is future, the contract is still valid: *White v. Barber*, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221; *Wolcott v. Heath*, 78 Ill. 433; *Logan v. Brown*, 81 Ill. 415.

VII. When the contract is illegal, and cannot be enforced, a security founded on that contract is void in the hands of the principal, of the broker, if *particeps criminis*, or of a purchaser with notice: *Steers v. Lashley*, 6 T. R. 61; *Re Green*, 7 Biss. C. Ct. 338; *Embrey v. Jemison*, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; *Brown v. Alexander*, 29 Ill. App. 626; *Cothran v. Ellis*, 125 Ill. 496; S. C., 16 N. E. Rep. 646; *Davis v. Davis*, 119 Ind. 511; S. C., 21 N. E. Rep. 1112; *Swartz's App.*, 3 Brewst. (Pa.) 131; *Griffith's App.*, 16 W. N. C. (Pa.) 249; *Dempsey v. Harm* (Pa.), 12 Atl. Rep. 27; S. C., 9 Cent. Rep. 615; *Brua's App.*, 55 Pa. 294; *Fareira v. Gabell*, 89 Pa. 89; *Griffiths v. Sears*, 112 Pa. 523; *Oliphant v. Markham*, 79 Tex. 543; S. C., 15 S. W. Rep. 569; *Barnard v. Backhaus*, 52 Wis. 593. If the broker be innocent he can recover, and so can a *bona fide* holder: *Lehman v. Strasberger*, 2 Woods C. Ct. 554; *Pearce v. Rice*, 142 U. S. 28; S. C., 12 Sup. Ct. Rep. 130; *Sondheim v. Gilbert*, 117 Ind. 71; *Crawford v. Spencer*, 92 Mo. 498. But when the making of such a contract is declared a crime by statute, a security founded thereon is void, even in the hands of a *bona fide* holder: *Hawley v. Bibb*, 69 Ala. 52; *Cunningham v. Bank*, 17 Cent. L. J. 470; *Bank v. Curningham*, 75 Ga. 366; *Snoddy v. Bank*, 88 Tenn. 573; *Bank v. Carroll*, 80 Iowa, 11; S. C., 45 N. W. Rep. 304.

VIII. One who is a party to such an illegal contract cannot, either at common law or in equity, recover money paid in furtherance of the transaction. As we have seen the broker cannot recover his advances on behalf of his principal, nor can the principal recover the money deposited with the broker as margins: *Lawton v. Blitch*, 83 Ga. 663; S. C., 10 S. E. Rep. 353; *O'Brien v. Luques*, 81 Me. 46; S. C., 16 Atl. Rep. 304; *Burt v. Myer*, 71 Md. 467; *Gregory v. Clark*, 39 Mich. 337; *Ruchizky v. De Haven*, 97 Pa. 202; *Stewart*

v. Parnell, 147 Pa. 523; S. C., 29 W. N. C. 537; 23 Atl. Rep. 838; *Sowles v. Bank*, 61 Vt. 375; S. C., 17 Atl. Rep. 791. There are occasional exceptions to this rule. Thus the customer can recover if he intended a *bona fide* sale and delivery: *Gregory v. Clark*, 39 Mich. 337. A minor can recover money so paid by him during minority: *Ruchizky v. De Haven*, 97 Pa. 202. When the broker acknowledges a balance in his hands in favor of the customer, the latter may recover, if he can show that the broker received the money for his use: *Peters v. Grim* (Pa.), 30 W. N. C. 177; S. C., 24 Atl. Rep. 192; *Reppier v. Jacobs*, 30 W. N. C. 180; S. C., 24 Atl. Rep. 194; *Floyd v. Patterson*, 72 Tex. 202; S. C., 10 S. W. Rep. 526. So a deposit of margins can be recovered if the customer revoke his illegal instructions: *Dancy v. Phelan*, 82 Ga. 243; S. C., 10 S. E. Rep. 205. Or if his complaint does not on its face show an illegal contract: *Clarke v. Brown*, 77 Ga. 606.

By statute, however, such payments are made recoverable in many of the States of the Union. The question depends on the wording of the particular statute; but in general either party may recover of the other: *Cushman v. Root*, 89 Cal. 373; S. C., 26 Pac. Rep. 883; *Kennedy v. Stout*, 26 Ill. App. 133; N. Y. & Chic. Grain & Stock Exch. v. *Mellen*, 27 Ill. App. 556; *Lyons v. Hodges* (Ky.), 13 S. W. Rep. 1076; *Peck v. Doran*, 46 Hun. (N. Y.) 454; *Copley v. Doran*, 1 N. Y. Suppl. 888; *Lester v. Bucl* (Ohio), 30 N. E. Rep. 821. Though it has been held that the broker cannot recover in Illinois: *White v. Barber*, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221.

One who knowingly lends money for the purpose of furthering a gambling transaction in futures cannot recover it: *Waugh v. Beck*, 114 Pa. 422; *Plank v. Jackson*, 128 Ind. 424; S. C., 26 N. E. Rep. 568, but if he take no part in the transaction mere knowledge on his part that the money was to be so used, will not preclude him from recovery: *Armstrong v. Bank*, 133 U. S. 433; S. C., 10 Sup. Ct. Rep. 450; *Jackson v. Bank*, 125 Ind. 347; S. C., 25 N. E. Rep. 430. The true test is whether or not he requires the aid of the

illegal transaction to make out his case; if so, he cannot recover; if not, he can: *Armstrong v. Bank*, *supra*.

IX. In all cases of alleged gambling contracts in futures, the question as to their nature is one of fact, not of law; for the jury, not for the court: *Washer v. Bond*, 40 Kans. 84; S. C., 19 Pac. Rep. 323; *Fareira v. Gabell*, 89 Pa. 89; *Thompson v. Reiber*, 123 Pa. 457; S. C., 23 W. N. C. 180; 16 Atl. Rep. 793.

X. There is one very curious kind of future contract that has frequently come before the courts during the past few years. This is what is known as a "Bohemian Oats" contract. By it a quantity of oats, professedly of a special brand, but in reality of ordinary kind, is sold to a farmer at a price far above its real value, and a bond is given by the seller to buy back a certain number of bushels of the crop at a high figure, promising a profit to the unwary agriculturist. With but one exception, *Watson v. Blossom*, 2 N. Y. Suppl. 551; S. C. Aff., 4 N. Y. Suppl. 489, these contracts have been held illegal as against public policy, and notes given on them void, except in the hands of a *bona fide* holder, subject to the exception in the latter case due to the operation of criminal statutes, as explained in *Schmueckle v. Waters*, 125 Ind. 265; S. C., 25 N. E. Rep. 281; *Glass v. Murphy* (Ind. App.), 30 N. E. Rep. 1097; *Kain v. Bare* (Ind. App.), 31 N. E. Rep. 205; *Merrill v. Packer*, 80 Iowa, 542; S. C., 45 N. W. Rep. 1076; *Shipley v. Reasoner*, 80 Iowa, 548; S. C., 45 N. W. Rep. 1077; *Sutton v. Beckwith*, 68 Mich. 303; S. C., 36 N. W. Rep. 79; *Mace v. Kennedy*, 68 Mich. 389; S. C., 36 N. W. Rep. 187; *McNamara v. Gargett*, 68 Mich. 454; S. C., 36 N. W. Rep. 218. The first Iowa case on this subject, *Hanks v. Brown*, 79 Iowa, 560; S. C., 44 N. W. Rep. 811, decided that such a contract was not obnoxious to the statute of that State against gambling contracts, strangely enough forgetting all about the common law and public policy; but this omission has been corrected by the later cases from that State cited above.

XI. A contract to "corner" the market by buying up stock or goods is illegal at common law as against public

policy: *Samuel v. Oliver* (Ill.), 22 N. E. Rep. 499; *Sampson v. Shaw*, 101 Mass. 145.

An agreement by which one guarantees to another that cattle to be sold by the latter shall bring so much a head, binding himself to pay the difference if they bring less, while the owner agrees to pay the difference to the guarantor in case they bring more, is a wager on the price of the cattle, and a note given for such difference is void: *Bank v. Carroll*, 89 Iowa, 11; *S. C.*, 45 N. W. Rep. 304.

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DICKSON v. WALDRON.¹ SUPREME COURT OF INDIANA.

The manager of a theatre is responsible for the acts of a special police who was appointed for the theatre, at the special request of the manager, by the Board of Metropolitan Police Commissioners, and who was employed and paid solely by such manager: 34 N. E. Rep. 306, affirmed.

The manager is liable for an assault and battery on an offensive patron by the special police, when acting as doorkeeper, since such act was with'n the scope of his employment in his master's business: 34 N. E. Rep. 306, affirmed.

LIABILITY OF A THEATRE MANAGER FOR ASSAULT COMMITTED BY A SPECIAL POLICEMAN.

The liability of a master for an assault and battery committed by his servant is based on the common law principle "*Qui facit per alium facit per se*," the theory being that the master in selecting his servants must do so with prudence and caution, and must select persons capable of fulfilling the duties

¹ Reported in 35 N. E. Rep. 1, Nov. 24, 1893.

he will exact under penalty of his personal responsibility for their torts.

This theory has been greatly modified in modern jurisprudence, until to-day the true criterion of the master's liability is embodied in the answer to the question, "Is the act complained of within the scope of the servant's authority?" If so, the master is liable; otherwise, not.

The test, as laid down by Cooley, is "not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name:" Torts, 536. The great difficulty in applying this principle lies in defining what acts properly fall within the scope of the servant's employment. In the case of *Ware v. Barataria*, 15 La. 169, it was held that where an agent lost sight of the object for which he was employed and committed a wrong, thereby causing damage, the principal was no more answerable for it than any stranger, the agent in such case acting of his own will, and not in the course of his employment, or under any implied authority of his principal. The duty of defendant's servant in this case was to open and close certain river locks and collect tolls, and the offence complained of by plaintiff was an assault and battery received by him from defendant's servant under pretext of said plaintiff not having paid his toll. This ruling was followed in the subsequent case of *Block v. Bannerman*, 10 La. Ann. 1, where the owner of a vessel was held liable for the tortious acts of the master, committed whilst in his service and within the scope of his authority.

The principle is true even if the tort be committed in disobedience to the master's orders: *R. R. Co. v. Derby*, 14 How. 468. In a comparatively recent case, the Supreme Court of Louisiana decided that plaintiff could not recover damages against the master for a wanton and unprovoked assault inflicted on him by defendant's servant, the plaintiff being a passenger on a train to which a Pullman Palace Car was attached, of which defendant's servant was porter, and having entered the palace car to ask permission to wash his hands. The court held that the assault was something which the ser-

vant's employment did not contemplate, and was not, therefore, within its scope: *Williams v. Palace Car Co.*, 40 La. Ann. 87.

In the case of *Turner v. Western, etc.*, R. R. Co., 72 Ga. 292, it was held that where one was lawfully in the cab of the freight train of a railroad treating for his passage, as had frequently been done, and was still being done at times of trial by other persons on the same train, as to an injury inflicted upon him he stands within the reason and spirit of the authorities in reference to like injuries done to passengers.

"The general doctrine with reference to master and servant, employer and employee, is, that when the employee committing the injury is not at the time executing the employer's business or not acting within the scope of his employment the employer is not responsible:" Pryor, C. J., in *Winnegar's Admr. v. R. R. Co.*, 85 Ky. 547.

In *McKinley v. The C. & N. W. R. R. Co.*, 44 Iowa, 314, an action was brought to recover damages for an assault by defendant's brakeman on plaintiff while latter was attempting to enter a passenger car at Howard Junction, Wisconsin, on March 22, 1872. Seevers, C. J., delivering the opinion, said: "If we were left to determine the question upon principle, whether an employer should be held liable for the wilful or criminal acts of the employee done in the course of his employment, we should have very little or no hesitation in affirming such liability, and this because the employer has placed the employee in a position to do wrong, and it being done in the course of his employment, the intent with which it was done should not affect the liability of the employer whether the intent of the employee is good or ill. So long as he acts within the scope of his employment the employer should be bound. The decided weight and number of the authorities are in accord with this view. We need only refer to some of them without stopping to discuss or review them." See *Turner v. North Branch R. R. Co.*, 4 Cal. 494; *G. Western R. R. Co. v. Miller*, 19 Mich. 305; *Finney v. R. R. Co.*, 10 Wis. 395; *Brooks v. Penna. Cent. R. R. Co.*, 57 Pa. 339; *St. Louis, etc., R. R. Co. v. Dalby*, 19 Ill. 353; *R. R. Co. v. Wetmore*, 19 Ohio, 110; *Isaacs v. R. R. Co.*, 47 N. Y. 122;

Goddard v. Grand Trunk R. R. Co., 57 Mich. 212; Rich v. Bryant, 106 Mass. 180; Cracker v. C. & N. W. R. R. Co., 36 Wis. 657.

"A railroad corporation is liable to the same extent as an individual would be for an injury done by its servant in the course of his employment: Moore v. R. R. Co., 4 Gray, 465; Hewett v. Swift, 3 Allen, 420; Holmes v. Wakefield, 12 Allen, 580. If the act of the servant is within the general scope of his employment, the master is equally liable whether the act is wilful or merely negligent: Howe v. Newmarch, 12 Allen, 49. Or even if it is contrary to an expressed order of the master: R. R. Co. v. Derby, 14 How. 468. . . . We deem it unnecessary to cite further authorities on this point. The principle lying at the foundation of the doctrine is as old as the common law, and is embodied in the maxim *qui facit per alium facit per se*, and is as applicable to corporations as to individuals. Doubtless, if a servant or agent commit a tort out of the scope of his agency or employment and not connected with it, the principle would not be liable therefor unless he previously authorized or subsequently ratified the act:" Ramsden v. R. R. Co., 104 Mass. 117. Where a servant in the employment of his master does an act which he is not employed to do the master is not responsible: Towanda Coal Co. v. Heeman, 86 Pa. 418. A master is liable for the results of the wilful conduct of his servant if within the scope of his authority, or for acts done by his command or with his assent: R. R. Co. v. Wilt, 4 Whart. 142; Yerger et ux. v. Warren, 7 Casey, 319; R. R. Co. v. McLain, 91 Pa. 442; Ry. Co. v. Donahue, 70 Pa. 119; Higgins v. Turnpike Co., 46 N. Y. 23.

A corporation is liable for the wilful acts and torts of its servants done to the injury of others, within the general scope of their employment: Terre Haute, etc., R. R. Co. v. Jackson, 81 Ind. 19; Jeffersonville, etc., R. R. Co. v. Rogers, 38 Ind. 116; Express Co. v. Patterson, 73 Ind. 430; Wabash Ry. Co. v. Savage, 110 Ind. 156; Ry. Co. v. Anthony, 43 Ind. 183.

The act of the agent within the general scope of his employment is the act of the master, and if wrongful the master is liable, although the act be unnecessary to the per-

formance of the master's service and was not intended for that purpose. The liability of the master does not depend upon the necessity of the act, or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent: *Indianapolis, etc., Ry. Co. v. Anthony*, 43 Ind. 183.

In *Noblesville, etc., v. Gause*, 76 Ind. 142, it is said: "Counsel have cited cases declaring the familiar rule that a master is responsible for the acts of the servant, only when the latter is acting within the scope of his employment; but this was an unnecessary work, for the general rule is too well settled and understood to need support from adjudged cases."

If a servant does a wrongful act without the authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible therefor; but if the act be done in the execution of the authority given by the master and for the purpose of performing what he has directed, he is responsible whether the wrong done be occasioned by negligence or by a wanton and reckless purpose to accomplish his business in an unlawful manner: *Howe v. Newmarch*, 12 Allen, 49.

By the civil law the liability was confined to the person standing in the relation of *paterfamilias* to the wrongdoer: Dig. lib. 9, tit. 3. But by the English law the liability is more extensive.

In *McManus v. Crickett*, 1 East. 106, Lord Kenyon, C. J., after quoting Chief Justice Holt in *Middleton v. Fowler*, Salk. 282, to the effect, "that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him," says: "Now, when a servant quits sight of the object for which he is employed, and without having in view his master's order, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act." See *Turberville v. Stamp*, 1 Ld. Ray, 264.

A master, however, is *not responsible* for the wrongful act of his servant unless that act be done in the execution of the

authority given by his master. *Beyond the scope of his employment* he is as much a stranger to his master as any third person, and therefore his act cannot be regarded as the act of his master: *Lamb v. Palk*, 9 C. & P. 629; *Garth v. Howard*, 8 Bing. 451; *Wilson v. Rankin*, 34 L. J., Q. B., 62; *McGowan v. Dyer*, L. R., 8 Q. B. 141.

A master is liable for injury caused by the wanton and violent conduct of his servant in the performance of an act within the course of his employment: *Seymour v. Greenwood*, 7 H. & H. 356; *Croft v. Alison*, 4 B. & Ald. 590; *Limpus v. Omnibus Co.*, 1 H. & C. 526; and such act only binds when done by the authority or consent of the master: *Ward v. Evans*, 2 Salk. 441; *Lyons v. Martin*, 8 Ad. & E. 512; *Gregory v. Pipe*, 9 B. & C. 591.

In *Drew v. Peer*, 93 Pa. 234, Thayer, P. J., instructed the jury that "the defendant is responsible for any loss or damage suffered by himself in consequence of the misconduct of the defendant's agents. It did not require an express direction to her agents to commit this injury to make her responsible." The instruction was affirmed by the Supreme Court, the facts in this case being almost identical with those of *Dickson v. Waldron*.

The following quotations are taken from the celebrated Doctor Fraser's work on the Scottish law of Master and Servant, as illustrative of the question in that country:—

"*Quasi delicts* have been defined by the Roman jurist, *facta illicita sola culpa sine dolo admissa*. They are acts which arise from carelessness, negligence, rashness, or want of skill, by which injury has been sustained, without any criminal intention on the part of the doer.

"If a servant does a wrongful act without the authority, and not for the purpose of executing the orders or doing the work of the master, the latter is not responsible in damages therefor; but if the act be done in the execution of the authority given by the master, and for the purpose of performing what he has directed, he is responsible whether the wrong done be occasioned by negligence, or by a wanton and reckless purpose to accomplish his business in an unlawful manner.

"The liability of the master for the servant's *quasi* delicts rests partly on the same principle with his liability for his servant's contracts:—viz., that expressed in the maxim, *qui facit per alium facit per se*,—partly on views of expediency, and partly also on the following grounds: The master is presumed to select the servant from a knowledge of, or at least a belief in his skill, steadiness, and care. He places him in a position in which he acquires a relation to the public which he would not otherwise hold,—a position entailing responsibilities which, but for their being thus delegated to another, the master would have to discharge for himself. Also, he entrusts him with the charge of property often calling for carefulness in its management, to avoid accident to others; and thus puts it in his power, by carelessness or rashness, to inflict injury on others to an extent that would not otherwise exist. For these and similar reasons the laws of most countries have sanctioned a departure, where the relation of master and servant exists, from the general principle, *culpa tenet suos auctores*. Page 150.

"First, it may be observed that the master is of course liable to answer for any injury caused by the servant in the direct execution of his express orders. With regard to this class of cases there is no difficulty; the connection between the wrong and the authority from which the act flowed is immediate, and sufficiently obvious.

"But, secondly, it falls to be remarked that, to make the master liable, no such immediate connection between his command and the act out of which the injury results is requisite. It is sufficient, in order to entail such responsibility on the master, that the servant was at the time acting under the general mandate implied in his contract of service—that he was doing his master's work, or even that he was at the time employed in an operation which might fairly be held to fall within the scope and sphere of his duties as servant, even though the master may have been utterly ignorant that his servant was engaged in that particular duty at the time.

"Two well marked exceptions to, or rather limitations of the rule, are to be noticed as now well settled by a series of decisions.

"The first of these is, that the rule only applies where the injury caused by the servant, for which it is sought to make the master answerable, arises out of something done by him while acting strictly within the scope and limits of his employment while discharging the duties for which he has been engaged under his contract with his master. The reason of this exception is, that the master's liability, having its origin in implied mandate, can have no place where the limits of that mandate are exceeded.

"The second exception is, that the rule applies only where the relation of master and servant exists in a strict and proper sense between the offending party and him whom it is sought to make responsible for the act. Where this is not the case, there is no room for applying the maxim, *respondet superior*." Page 151.

"The rule which is now established is, to quote the words of Willes, J., in *Barwick v. The English Joint Stock Bank*—an action against a bank for fraudulent misrepresentation on the part of its manager—that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." *Macdonell, Master and Servt.* 258.

"A master is liable for the wrongful act of his servant, to the injury of a third person, where the servant is engaged at the time in doing his master's business, and is acting within the general scope of his authority, although he is reckless in the performance of his duty, or through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty, and inflicts unnecessary and unjustifiable injury." *Wood, Mast. and Servt.* (2d Ed.) §89.

A master is liable for the act of his servant done in the course of his employment: *Helyear v. Hawke*, 5 Esq. 72.

As to the servant's tort and negligence, the universal rule is, that the master is responsible in damages to third persons for the act of his servant occasioning an injury, whether the act is of omission or commission, in conformity to or in

disobedience of the master's order, by negligence, fraud, deceit, or even wilful misconduct so long as it was in the course of the employment: Browne, Dom. Rel. 136.

The master is not liable for a wrongful, wilful, and unlawful, act of his servant toward a third person, although the servant professes to be acting in the master's employment, if the act is entirely independent and outside of and having no proper connection with the employment: Browne, Dom. Rel. 138.

A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servants if those acts are done in the course of his employment in his master's service. The maxims applicable to such cases being *respondent superior* and *qui facit per alium, facit per se*: Smith, Master and Servant, 322.

This rule is universal in its application and whether the act be negligent, fraudulent or deceitful, or even an act of positive malfeasance or misconduct, if done in the course of his employment, the master is responsible *civiliter* to third persons: Story, on Agency, 452; Paley, on Agency, 294; Pothier, on Oblig. (Evans) 456.

In conclusion, I will cite the following rule laid down by the eminent Judge Cooley, cited with approval by the Supreme Court of Louisiana in the case of *Williams v. Palace Car Co.*, *supra*: "It will readily occur to every mind that the master cannot, in reason, be held responsible generally for whatever wrongful conduct a servant may be guilty of. A liability so extensive would make him guarantor of the servant's good conduct, and would put him under a responsibility, which prudent men would hesitate to assume."

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DEWEY ET AL. *v.* TOLEDO, A. A. & N. M. Ry. Co.¹ SUPREME COURT OF MICHIGAN.

The purchase by a railroad company of stock in another company whose line is not parallel, for the purpose of acquiring the latter's right of way, is valid under How. (Mich.) Stat., § 3403, authorizing any railroad company which had in good faith entered upon the construction of its road and become unable to complete the same, to sell the road and its rights and franchises to any other railroad company not having the same terminal points and not being a competing line.

THE POWER OF ONE RAILROAD COMPANY TO PURCHASE STOCK IN ANOTHER.

The rapid tendency towards consolidation of smaller railroad companies into great systems, now progressing in the United States, makes the question of the legality of a course not unfrequently practiced for such a purpose, one of much interest.

A corporation is a creature of the Act of Incorporation and as such has no other powers than are expressly granted or are necessary to effect the ends and objects of its existence. The charter being a contract between the public and individuals must be strictly construed. Each right the corporation possesses need not be specially enumerated, but no authority can be inferred other than for purposes directly conferred: *The New Orleans, etc., Co. v. Dock Co.*, 28 La. Ann. 173; *Franklin v. Lewiston Institution for Savings*, 68 Me. 43.

¹ Reported in 51 N. W. Rep. 1063.

The right of a railroad company over its funds cannot be construed according to the rules applicable to literary, scientific and religious corporations. Such corporations require authority to invest their money in order to maintain themselves and preserve whatever may be given them. In such charters the power, if not expressly mentioned, is implied, that they may successfully engage in the enterprises for which they are organized and render what funds they have productive.

At common law the directors of one railroad company have no authority to invest their capital or profits in the stock of another. Railroad corporations are chartered to transport passengers or merchandise, and are bound to apply all the monies and property of the company for that purpose. Investing their funds in that of other corporations is not within the scope of the business for which they are incorporated: *Munsell v. Midland, etc., R. R. Co.* (1863), 1 H. & M. 130; *Woods v. Memphis, etc., R. R. Co., 5 Ry. & Corp. L. J.* 372; *Hazelhurst v. The Savannah, etc., R. R. Co.*, 43 Ga. 13; *Haver v. New York, etc., R. R. Co.*, 19 Abb. N. Cas. 456; *MacIntosh v. Flint, etc., R. R. Co.*, 34 Fed. Rep. 582; *The Central, etc., R. R. Co. v. The Penna. R. R. Co.*, 36 N. J. Eq. 475; *Solomons v. Laing*, 12 Beav. 339; *The Great Northern Ry. Co. v. The Great Eastern Counties Ry. Co.*, 21 L. J. Ch. 837; *The New Orleans, etc., Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; *The Great Western Ry. Co. v. The Metropolitan Ry. Co.*, 32 L. J. Ch. 382; *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20.

"Every charter of a private corporation is a contract, first between the State and the corporation—to which each is solemnly bound—the State that it will not impair the obligation—the corporation that it will perform the objects of its corporation and keep within the powers granted to it; secondly, between the stockholders themselves. The stockholders are bound to consent to the management of the affairs of the corporation by the majority, and by the by-laws which the majority makes. And the whole on the other hand agree with each other that they will apply the funds of the company to the

objects and purposes of the charter and not otherwise. Both as between the State and the corporators, the law of this contract is the charter. The State has granted to it no rights and the individual stockholders have clothed it with no rights, except such as are clearly and expressly set down in the charter: *Central R. R. Co. v. Collins*, 40 Ga. 582.

State constitutions sometimes contain express prohibitions against the purchase of stock in other roads. On the other hand, single companies are occasionally authorized to do so by their charters and in other instances, general law; *Zabriskie v. R. R. Co.*, 23 How. (U. S.) 381; or special Acts; *Mayor of Balto. v. Balto.*, etc., *R. R. Co.*, 21 Md. 50; confer the power.

If one railroad company may, at its option, buy the stock of another it undertakes a new contract not contemplated by its charter: *Hazelhurst v. The Savannah*, etc., *R. R. Co.*, 43 Ga. 13.

It is no answer that the action of the directors is of benefit or profit to the shareholder seeking to prevent the purchase. Whether it is to his interest, is for him to judge. He has a legal right to insist that the company shall be kept within the legitimate scope of the charter: *Elkins v. Camden*, etc., *R. R. Co.*, 36 N. J. Eq. 5; *Central R. R. Co. v. Collins*, 40 Ga. 582.

Power expressly granted to a railroad company to maintain the road does not authorize a purchase of stock in a rival road because such purchase is necessary to its self preservation.

The Central Railroad Company was given by its charter power to "have, purchase, receive, possess, enjoy and retain to them and their successors, lands, rents, tenements, goods, chattels and effects, of whatsoever kind, nature and quality, the same may be, and to sell, grant, demise, alien or dispose of the same." It was argued that such an indefinite grant authorized them to purchase and hold any kind of property necessary to protect the road, and was not precluded such a construction by a proviso restricting the power to such lands as it might acquire in satisfaction of debts and such as might be necessary and proper for laying, building and sustaining the railroad. In reply it was said by the court, "To give these words the meaning contended for would be to make the Central Railroad

and Banking Company a corporation for any purpose whatever. It might engage in whatever enterprise that the cupidity of its directors or their fancy or folly might suggest to them."

"What does a grant to maintain and sustain a railroad include? Can it in any fair sense be construed to authorize the engaging in any other enterprise which will extend the business or lessen the rivalries of the company. The 'maintaining and sustaining' of the road has reference to keeping it in repairs, supplying it with machinery and such like acts and not to projects for extending its business, by schemes and enterprises not contemplated and expressed in clear, unambiguous terms by the charter itself:" *Central R. R. Co. v. Collins*, 40 Ga. 582. See *contra*: *Ryan v. The Leavenworth, etc., R. R. Co.*, 21 Kan. 365; *Atchison, etc., R. R. Co. v. Cochran*, 43 Kan. 225. See, however: *Penna. R. R. Co. v. Com.*, 7 Atl. Rep. 368.

The General Railroad Laws of Michigan provide that one railroad corporation may subscribe to the capital stock of any other railroad company organized under the said Act with the consent of the latter; and by other provisions, one railroad company is authorized to aid another having an unfinished road, and to make running arrangements; and where their lines are connected to enter into arrangements for their common benefit, consistent with and calculated to promote the objects for which they were respectively created. In *MacIntosh v. Flint, etc., R. R. Co.*, 34 Fed. Rep. 582, it was decided that these statutory provisions did not authorize one company to acquire the stock and franchise of another completed company.

A company having authority to purchase a limited number of shares in another cannot increase its holding: *Solomens v. Laing* (1849), 12 Beav. 339; *The Great Western Ry. Co. v. The Metropolitan Ry. Co.*, 32 L. J. Ch. 382.

Since chancery will enjoin acts of this character, so will it decline to lend its aid where, by so doing, it would give effect to them: *The Great Northern Ry. Co. v. The Great Eastern Counties R. R. Co.*, 21 L. J. Ch. 837; *The Great Western Ry. Co. v. The Met. Ry. Co.*, 32 L. J. Ch. 382. In this latter case the company had been authorized by Parliament to hold

a stated number of shares in another road. The directors of this road decided to increase the number of shares, but refused to make any allotment to the other company as shareholder. A bill in equity was filed to compel an award of the proportion which their shares entitled them. In dismissing the bill, Lord Justice Turner, one of the court, observed, while they were not entitled to receive and hold the additional shares, yet had the bill averred an intention to dispose of their allotment and prayed that it be made in order that the benefit to be derived from their sale might be secured to the company, such question would be worthy of much consideration.

The purchase of stock in a parallel and competing line was held to be prohibited by the Constitution of Pennsylvania which provided: "No railroad . . . or the lessees, purchasers or managers of any railroad . . . shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad owning or having under its control a parallel or competing line: *Penna. R. R. Co. v. The Commonwealth (Pa.)*, 7 Atl. Rep. 368.

The right to lease does not give the right to buy a road or become the purchaser of its stock: *Central R. R. Co. v. Collins*, 40 Ga. 582.

By the General Railroad Laws of New Jersey (Rev. p. 730, § 17), and the Act of 1880 (P. L. 1880, p. 231), power was given to railroad companies to lease their roads or any part of them to any other corporation or corporations of that or any other State, or to unite or consolidate as well as merge their stock, property and franchises and roads with those of any other company or companies, and it was further provided that the company acquiring the other road might use and operate both or either of the roads.

The Camden and Atlantic Railroad on the strength of these statutory privileges attempted to purchase the majority of the stock and bonds of a rival road, and assume control of certain of its debts. A bill in equity was brought to prevent such purchase. In sustaining the injunction it was said by the Supreme Court: The Acts of the Legislature while

they gave the Camden and Atlantic Railroad power to unite and consolidate with other roads, it gave it no power to purchase the debts of another company or its road. Union and consolidation of two rival railroad companies are one thing and purchase by one company of the property and franchises of the other is another. Such purchase is foreign to the object of its incorporation. The power to build lateral or branch roads given by the charter, was not considered to strengthen the contended construction: *Elkins v. Camden, etc., R. R. Co.*, 36 N. J. Eq. 5.

Although the company may have authority by the law of the State where it originated, yet it cannot purchase the stock of a road in another State, unless expressly authorized so to do by local legislation: *Woods v. The Memphis, etc., R. R. Co. (Ala.)*, 5 Ry. & Corp. L. J. 372.

A State cannot by an Act subsequent to the charter, confer the power on a railroad to invest its fund in the bonds or stock of another: *Central R. R. Co. v. Collins*, 40 Ga. 582; *White v. The Syracuse, etc., R. R. Co.*, 14 Barb. (N. Y.) 559.

By the Act of 1852, of Georgia, the Central Railroad Company was given power to lease several railroads by name as well as any other road that might "connect" with it, and by a subsequent Act authority was given to connect their tracks at the city of Savannah.

In the opinion of the Supreme Court it was held that, "any such power, though expressly granted, does not bind any of the stockholders who do not consent to it. Each stockholder has rights in the nature of contract, rights in the limitations as well as in the grants to the corporation, and even the legislative will cannot under the Constitution of the United States impair those contract rights, by making him against his will an adventurer in an enterprise not contemplated in the original charter: See also *White v. The Syracuse, etc., R. R. Co.*, 14 Barb. (N. Y.) 559.

If the Legislature has reserved to itself the right to alter the charter of the company, the proper number of shareholders may take advantage of a subsequent Act, authorizing a purchase of stock in another company, by the consent of a certain

road runs, are chosen to serve with them. Laws have been introduced in various states to check the abuses to which the methods of receiverships have given rise, but while these statutes have done good as to certain matters of detail, the commercial facts of which we have spoken have been strong enough thus far to prevent any material modification of the policy.

The immediate cause of a railway receivership is usually the floating debt. Strictly speaking, the expression "Floating Debt" means the money borrowed by a company on collateral and made payable on demand or within a short time. The term, however, is sometimes used to cover other debts of the corporation, such as for supplies which have been bought but not paid for. A railway which is fairly prosperous can arrange to pay its bond interest in a period of depression without showing signs of distress. Every large business concern, such as a manufactory, must arrange for a depreciation of plant and machinery before setting aside earnings applicable to interest or dividends. The reason for this is that were a contrary course to be pursued, the stock or bond holders would very shortly find themselves in possession of a worthless property. In factories the expected losses from depreciation are usually arranged for by setting aside a certain sum of money from the earnings yearly, but the practice of railways is different. It is the custom with them to renew or replace road bed, track and equipment from year to year as fast as these deteriorate or become worn out, charging the cost directly to working expenses. By these means the whole plant is kept up to its standard at the expense of the earnings, the effect being the same as though specific sums had been set aside from income each year. This method of arranging for depreciation allows the railways to vary the amount of replacement from year to year according as the seasons are prosperous or the reverse. In a good year more may be spent upon the road bed and track and for the purchase of new equipment to replace the old at the cost of working expenses, than perhaps was proportionately required. Then in poor years not so much of this sort of work may be done, allowing a larger pro-

portion of gross income to be payable to bond and stockholders. This saving in the working expenses by a stoppage of repairs to the plant is usually the first resort of the railway manager when pressed for immediate money to pay bond interest. Then there are always demands for new capital for improvements necessary to be made by every railway as its traffic increases. Ordinarily, bonds are sold to meet these capital charges. If, because of a lack of confidence on the part of the investing public, or a lack of credit as regards this particular company, such bonds can not be sold, except perhaps at a great sacrifice, then the management proceed to borrow the necessary money for these capital improvements and perhaps for the then due bond interest. Usually, the company must hypothecate with the bankers from whom the money is borrowed, bonds either of the company itself or such as are held in its treasury and controlling subsidiary lines, important to the integrity of the system, so that the banker's loan may be fully secured. If matters go from bad to worse, if it appear to the lender that the situation of the company is becoming more and more critical so that he is beginning to doubt the real value of the collaterals held by him, he then calls for his money, if it is loaned on demand, or gives notice that he will ask for it when the same matures. If the company can not arrange to borrow the amount from some one else, and if it is confronted with the sale of all its securities at bankrupt prices, the managers may resolve to confess their own insolvency, before a public confession is made by the sale of the securities held by the banker. Perhaps, just at this moment, a large amount of interest is due to bond holders. In such a case the railway managers may choose to default on the bond interest and take the money for payment to the floating debt holders, in order to save for the company the collateral which the bankers may hold, and which may be essential to the control of parts of the system, but which would very likely go for a song if pressed for immediate sale. While, therefore, floating debts do not differ from other obligations of the company except in form, they have come to be recognized in Wall Street as a source of great danger in any period of business

depression or lack of credit. If this money borrowed on demand or on short notice can be funded into bonds having years to run, the company cannot suffer through a demand upon it for the principal, but is safe so long as the interest is promptly paid. This reasoning has led railway companies at times to adopt the plan of selling long time bonds in order to pay off the floating debt, even though the price received should be far below par. But such a course compels the company to pay a very high rate of interest during the whole life of the bonds and is considered such bad financing that such sales are taken in Wall Street as an acknowledgment that the company is hard pressed—with results to the credit of the corporation almost as bad as though the distress had been openly acknowledged. Under these circumstances "friendly" receivers are asked for so that interest may be withheld from the bond holders and used to take up the obligations of the company immediately pressing, particularly in cases where a failure to meet those obligations would entail severe losses upon the system for all time.

The court appointing receivers, thus asked for, usually stipulates that debts incurred in the operation of a road for six months shall be paid by the receivers. At first blush it would appear that such an order entails hardship upon the creditors of the company, yet upon examination it will be found to be equitable. Transportation is conducted as a cash business. Travelers and shippers are required to pay their money down before taking their journey or receiving their property. Since a railway must be run in the interest of the general public, and since this involves the theory that its working expenses must be paid, it is clear that the expenses of to-day are properly chargeable to the gross receipts of to-day paid in cash by the patrons of the road. But as we have seen, in periods of distress, the managers in order to postpone a confession of bankruptcy in the hopes that the temporary trouble may be tided over, begin to put off payments for wages or for coal, rails, ties and supplies of all descriptions which they may continue to buy, because necessary for the continued operation of the trains. In this way, at the date of appointment of

receivers, every bankrupt road has large arrears of wages and accounts to be made up. As these current obligations are really chargeable to the receipts of the several months past, and as these receipts have been taken to pay bond interest or for other purposes in the interest of the bond holders, it is proper that the prior claims for current expenses should be made up from the first receipts of the road under the receivership. If there is any complaint to be made on the part of the bond holder it is that the knowledge of these facts has not been brought to their attention; but usually in such a matter the managers of the road act in good faith, in the hopes that better times may enable them to pay up the back debts, and save the indirect losses to the bond holders, which a public confession of the real situation would at that time have caused.

The heavy expenses confronting the receivers at the time of their appointment are met partly from defaulted bond interest and perhaps from receivers' certificates. At first these certificates, made a first lien on the property, were authorized very sparingly by the courts and only in cases shown beyond dispute to be necessary. Gradually such issues were extended, until the present practice is for authorization of certificates for any purpose which the court may be led to believe is for the ultimate benefit of the road. In this way another mortgage is put ahead of the regular mortgage, whose bonds, held by the public, have been supposed and declared to be a prior lien upon the road. The force of circumstances often thus impairs the rights of existing mortgages though these be drawn in strong legal language. Foreclosure is also a right expressly granted by the mortgaging company to the holders of its bonds if in default, but in practice this right is subject to modification. It should be recollected that a railway plant, costing perhaps \$50,000 per mile, is worth but a fraction of that sum in itself as real estate and old iron. What is really mortgaged is the income received from transportation. If that income is reduced from business causes, the value of the company's bonds is correspondingly reduced. As just said, the directors, at the first appearance of a decline in profits, economize in depreciation expenses, hoping for better times.

number of shareholders : *White v. The Syracuse, etc., R. R. Co.* (1853), 14 Barb. (N. Y.) 559.

Where no power has been reserved to the State to sanction such a use of corporate funds, a stockholder may sometimes, by his failure to object at the proper time, estop himself from afterwards complaining: *MacIntosh v. Flint, etc., R. R. Co.*, 34 Fed. Rep. 582.

In *Zabriskie v. The Cleveland, etc., R. R. Co.*, 23 How. (U. S.) 381, the complainant, who was a stockholder in the defendant company, was present by proxy at a meeting at which it was agreed to guarantee the bonds of another company. No objection was made in his behalf. It was held he could not complain after some of the guaranteed bonds had been sold.

So, in *Hill et al. v. Nisbet et al.*, 107 Ind. 341, persons who constituted a majority of the directors, when the purchase of stock was made, were held to have no standing in equity to question the validity of such purchase.

It is possible that a right of action which might arise out of the relations of such companies could not be enforced : *Thomas v. R. R. Co.*, 101 U. S. 71.

Should all the shareholders unite and authorize the use of the company's funds for the purchase of stock in another road, the State may, at any time, interfere and compel its sale or deprive the company of its charter: *Mathe v. v. Murchison* (U. S. C. C., N. Car., E. Dist.), 9 Am. & Eng. R. R. Cas. 590.

A shareholder in a company, whose stock has been bought by a rival company, can enjoin the rival company from voting on the shares held by it at a meeting of his company: *Pearson v. Railroad* (1883), 62 N. H. 537.

And this rule is equally applicable, if not stronger, where the power to vote has alone been purchased: *Woods v. The Memphis, etc., R. R. Co. (Ala.)*, 5 Ry. & Corp. L. J. 372; *Haven v. New York, etc., R. R. Co.*, 19 Abb. N. Cas. 456. See *contra*: *Mathews v. Murchison*, 9 Am. & Eng. R. R. Cas. 590.

But such stockholders cannot complain because of the mere taking title to and holding of the stock and the collection of

dividends as they may accrue. It is only where the company seeks to vote upon the stock and thereby control the corporation that they are prejudiced: *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20.

State statutes have in several instances been declared to empower a railroad corporation to hold the stock of another: *Zabriskie v. R. R. Co.*, 23 How. (U. S.) 381.

Section 3951, R. S. 1881 of Indiana, authorizes any railroad corporation organized, under the provisions of the general railroad law, "to acquire, by purchase or contract, the road, the road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect its line. In *Hill et al. v. Nisbet et al.*, 100 Ind. 341, this provision was regarded as sufficiently broad to empower a purchase of stock in an intersecting road. Mr. Justice Mitchell, speaking for the court, said: "If in any case it should appear to be a necessary or reasonable means to acquire the franchise of an intersecting railroad company, and by the averments in the complaint, the purpose for which the stock was purchased may be fairly inferred, no reason is perceived why it might not be accomplished by purchasing the stock instead of purchasing the corporate property directly."

Where extraordinary circumstances arise the common law rule may not be enforced. A railroad company may, without express authority, acquire stock in another corporation in satisfaction of a debt or by way of security for a claim which is in danger of being lost, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss: *Hodges v. New England Screw Co.*, 1 R. I. 312; *Pierson v. R. R.*, 62 N. H. 537; *Woods v. The Memphis, etc., R. R. Co. (Ala.)*, 5 Ry. & Corp. L. J. 372; *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20.

Having obtained the stock it may collect the dividends: *Woods v. Memphis, etc., R. R. Co. (Ala.)*, 5 Ry. & Corp. L. J. 372; *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20.

In *Elkins v. R. R. Co.*, 36 N. J. Eq. 233, a shareholder filed a bill in equity to prevent the sale of 800 shares of stock

of another railroad, claiming that by so doing they would depreciate their road and deprive it of its influence in the other company. The stock had been obtained in exchange for iron rails which they had ceased to use. It appeared the directors, believing it to be for the benefit of their road, had authorized the sale to be made by their president at a price shown to be its market value by a public sale of part of it. The court declined to interfere.

A corporation cannot, by a simulated compliance with the provisions of the law, subscribe for stock through its agents or employes. In the case of the *Central R. R. Co. v. The Penna. R. R. Co.*, 36 N. J. Eq. 475, the National Storage Company, incorporated under the laws of New Jersey, was restrained from laying its tracks across the land and tracks of the Central Railroad Company of New Jersey, because it appeared that the capital stock of the storage company was held in trust for persons owning large interests or largely concerned in the management of the Pennsylvania Railroad Company.

Where the *ultra vires* Act is as yet only in contemplation, it has been urged to induce a court of equity to act, the complainant should show he would sustain irreparable injury. But the courts have answered that they will restrain such an act although it appear to be of material advantage to him: *Central R. R. Co. v. Collins*, 40 Ga. 582; *Elkins v. Camden*, etc., R. R. Co., 36 N. J. Eq. 5. Thus the directors may be restrained from borrowing money for an anticipated purchase.

Public policy is often cited as declaring the annihilation of the lesser lines as an evil. That it will result in good is claimed by those desiring to bring the condition about. It was said by the president of one of our trans-continental railroads: "The crystallization of small and local lines, and the absorption of branch roads is viewed with grave popular apprehension, but I cannot regard it as a thing to be dreaded. I am very sure now, as I have been for the last twenty years, and as I long ago expressed myself, that a great consolidated corporation or even a trust can be held to far stricter

responsibility of the law than numerous smaller and conflicting corporations." Cook on Stockholders, § 315, note.

Where the power to make a contract for the purchase of stock in another companies is granted in the charter, the public policy of such a grant is not a consideration for the court. It has been said, however, where no such privilege exists, that public policy furnishes an additional reason for the application of the rules of strict construction.

In the *Central R. R. Co. v. Collins*, 40 Ga. 582, it was said by the court: "All experience has shown that large accumulation of property in hands likely to keep it intact for a long period, are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar facilities for such accumulation and most governments have found it necessary to exercise great caution in their grants of corporate powers. Freed, as such bodies are, from the sure bound to the schemes of individuals—the grave—they are able to add field to field and power to power, until they become too strong for that society which is made up of those whose plans are limited by a single life."

"There is, too, in this country, a reason for strictly construing charters and for confining corporations to their powers that do not exist in any others. Under other forms of government if a charter be found to have privileges which prove dangerous, it is in the power of the State to alter or repeal the charter. But getting their grants as most of our corporations do from the State they are held to be contracts, and it is not in the power of the State, under the Constitution of the United States, to materially interfere with the grant however improvident or unwise it may prove to have been. For these reasons it has in this country, as well as in England, ever been considered the very highest public policy to keep a strict watch upon corporations, to confine them within their appointed bounds, and especially to guard against the accumulation of large interests under their control."

Again, in *Milbank v. New York, etc., R. R. Co.*, 64 How. Pr. 20, Haignt, J., said: "It is against public policy to permit the officers of a corporation to take the corporate funds

belonging to the stockholders and expend it in purchasing or speculating in stocks of other companies. In the second place, it is against public policy to have or permit one corporation to embarrass and control another and perhaps competing corporation in the management of its affairs.

Equitable relief will be granted at the instance of a single shareholder: *Elkins v. Camden, etc.*, R. R. Co., 36 N. J. Eq. 5; *Solomens v. Laing*, 12 Beav. 339; *Central R. R. Co. v. Collins*, 40 Ga. 582.

Nor does it matter that the shareholder asking relief acquired his stock for the purpose of defeating an intended purchase. Where an Act is *ultra vires* the relief cannot be affected by such circumstances: *Elkins v. Camden, etc.*, R. R. Co., 36 N. J. Eq. 5.

A State as shareholder may bring the action, but citizens in their character as such are not proper parties: *Central R. R. Co. v. Collins*, 40 Ga. 582; *Woods v. Ry. Co.*, 5 Ry. & Corp. L. J. 372.

Before invoking the arm of chancery it is necessary in general to give the stockholder a standing in court that the directors be requested to refrain from a contemplated violation or remedy an existing one, but this is not always necessary. It has been said, "the whole governing force may have become so corrupt or have entered into a combination so destructive of the policy and property of the company as to show that an appeal to the directory would be fruitless and delay extremely perilous. In such cases, an application to the directors would be without avail and equity will take jurisdiction:" *Woods v. Memphis, etc.*, R. R. Co. (Ala.), 5 Ry. & Corp. L. J. 372 (Cobb's Chan.).

Where the directors have violated the charter of their company it becomes a question how far they are personally responsible to refund money so applied. The liability has been said to depend on whether the violation was a mistake such as a man of ordinary prudence exercises in his own affairs. In *Hodges v. New England Screw Co.*, 1 R. I. 312, it was said: "If the mistake was such as, with proper care, might have been avoided they ought to be liable. If, on the other hand, the

mistake be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the company they ought not to be liable. If the innocent mistakes of directors in cases where the law was unsettled or unknown, is to subject them to damages, great injustice would be done. The law requires of them care and discretion such as a man of ordinary prudence exercises in his own affairs; and if they practice this and, nevertheless, make a mistake the law does not hold them answerable."

It would seem however that the liability of directors might more properly be regarded as the liability of trustees, and that they would only be protected by first taking the advice of counsel: *Augell & Ames on Corp.*, § 392.

MAURICE G. BELKNAP.

NOTES AND COMMENTS ON RECENT DECISIONS.

The following is a judgment in the Quarter Sessions, for obvious reasons we think it better to omit the name of the county and judge.

The defendant had in his possession packages of oleomargarine which came to him from another State as an article of merchandise and have remained in that condition unopened.

Is he liable to be convicted of a misdemeanor because he has sold them in the same condition, that is unopened?

The court in passing on this question is in somewhat of a dilemma.

Oleomargarine is a product of material taken from the carcasses of neat cattle. It was invented at the instance of the French Government for the use of their armies in hot climates, and the chief consumer at present is Holland from which the world receives and consumes it as food in the form of butter and cheese. No one has as a matter of fact ever doubted that it is a perfectly wholesome article of food—it is

as impossible to doubt this as in the Virginia case it was impossible to believe that beef ceased to be wholesome as food because slaughtered without the State; even the police power failed to protect the butchers in that case from the commerce clause.

Possessing this knowledge in common with all persons of moderate information the court is compelled to recognize that by a statute, without trial or evidence and probably without any inquiry, this article of food is condemned and the use of it as food is made criminal. As, however, the statute imposes the same consequences on those who prefer to substitute olive oil for butter which if used in any other way than as a substitute is lawful, it is impossible not to feel that there is no guide but the words of the statute. We have nothing outside the statute that assists in the interpretation of the Act—as exists for instance in legislation regulating the sale of dangerous drugs.

On the contrary we have now a large and influential body of citizens banded together to bring their votes to bear on this one question—*dicenda est decomargarine*.

We have been told authoritatively that the Legislature has the right to determine the unfitness of food for consumption and they have done so, and that this is no longer open to question.

Whether, when the same process is applied to Chicago beef or balbriggan undershirts, the logic will support the strain, it is not for an inferior court to consider. What the courts governing us have decided is this plain proposition—that if the Legislature shall recite that a particular article of food is unwholesome—and its use criminal no one can dispute the fact nor inquire into the truth of the assertion. The evasion of the constitutional guarantee of free trade between the State is thus left to the caprice of someone whether Legislature or court is not very material in the light of experience, for the next generation will certainly see that it is only necessary to assert that foreign products are unwholesome and the work is done.

It is therefore of the utmost importance that the rights of

the community, so far as they are protected by the Constitution of the United States, should be maintained. And by this it is clear that merchandise brought from one State into another, and until it leaves the condition in which it is sent and is sold or consumed, cannot be interfered with by the State unless it be to require it to be so kept as to injure no one. But if it is absolutely harmless, and still more, if it be a useful article that can under no circumstances injure any one it is not within the power of the State, even when engaged in the beneficent scheme, of preventing competition with the products of some of its own citizens at the expense of the masses to make the possession of such an object of commerce criminal even with the aid of the police power.

While, therefore, if it had been shown that this defendant had ventured to use oleomargarine on his bread at his breakfast, I should have felt myself bound to draw the inference that he had been guilty of substituting, to use the words of the Act, an oleoaginous substance not made from cream in the place of butter or cheese, I am, I think, prohibited by the Constitution of the United States from interfering with an article of commerce coming from another State, and which is free from all objections except relative cheapness as compared with butter, or with the liberty of a person who is simply the possessor of the article in the condition in which it is carried by the railroads from another State into this.

It will be time enough to consign him to prison when he ventures to consume the article as food or to sell it in any condition other than that in which it was imported. For until otherwise instructed I am compelled to hold that the right to import merchandise, guaranteed by the Constitution of the United States, includes also the right to sell it and in this I am supported by the Supreme Court of the United States in *Leisy v. Hardin*, which, though asserted in reference to intoxicating liquor, does not seem to be confined to that particular class of merchandise, I therefore give judgment for the defendant.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to William Draper Lewis, Esq., 728 Drexel Building, Philadelphia, Pa.]

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS IN THE UNITED STATES. By CHRISTOPHER G. TIEDKMAN. New York and Albany: Banks & Bros., 1894.

HAND-BOOK OF CRIMINAL LAW. By WM. L. CLARK, JR. St. Paul, Minn.: West Publishing Co., 1894.

A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By LEONARD JONES. In Two Volumes. Fifth Edition. Boston: Houghton, Mifflin & Co., 1894.

THE LAW RELATING TO REAL ESTATE BROKERS, as decided by the American Courts. By STEWART RAPALJE. New York: Baker, Voorhis & Co., 1893.

DIGEST OF INSURANCE CASES, for the year ending October 31, 1893. By JOHN FINCH. Indianapolis: The Rough Notes Co., 1893.

CASES ON CONSTITUTIONAL LAW, with Notes. Part II. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever, 1894.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by T. E. and E. E. BALLARD. Vol. II, 1893. Crawfordsville, Ind.: The Ballard Publishing Co., 1893.

A TREATISE ON THE LAW OF BUILDING AND BUILDINGS, especially referring to Building Contracts, Leases, Easements and Liens, containing also Various Forms Useful in Building Operations, a Glossary of Words and Terms commonly used by Builders and Artisans, and a Digest of the Leading Decisions on Building Contracts and Leases in the United States. By A. PARLETT LLOYD. Second Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY. By LEONARD A. JONES. Fourth Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

AMERICAN RAILROAD AND CORPORATION REPORTS, being a Collection of the Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago: E. B. Myers & Co., 1893.

THE BANKING QUESTION IN THE UNITED STATES, Report of the meeting held on January 12, 1893, under the auspices of the American

Academy of Political and Social Science. Addresses by HORACE WHITE, MICHAEL D. HARTER, A. B. HEPBURN, J. H. WALKER, HENRY BACON and W. L. TRENNOLM. Philadelphia: American Academy of Political and Social Science, 1894.

THE BENCH AND BAR OF NEW HAMPSHIRE, including Biographical Notices of Deceased Judges of the Highest Courts and Lawyers of the Province and State, and a List of Names of those now living. By CARL H. BELL. Boston and New York: Houghton, Mifflin & Co., 1894.

THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE. By EDWIN R. BRYANT. Boston: Little, Brown & Co., 1894.

REPORT OF THE TAX COMMISSION OF OHIO, of 1893.

AN ESSAY ON THE LAW RELATING TO TELEGRAPH COMPANIES. By EDWARD BROOKS, JR., of the Philadelphia Bar. Lancaster: Wickerham Printing Co., 1893.

BOOK REVIEWS.

THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA:
being a series of lectures delivered before Yale University.
By JOHN F. DILLON, LL.D. Boston: Little, Brown & Co.
1894.

Yale University is doing her full share towards the advancement of American Jurisprudence. Of the judges now constituting the bench of the Supreme Court of the United States, three are sons of Yale, and, if the wishes of her alumni who are lawyers can prevail at Washington, she will soon have a fourth in the person of Judge Simeon E. Baldwin, of the Supreme Court of Errors of Connecticut, who has been, for many years, the great high priest of the Yale Law School. She was the first University in America to establish a graduate course leading to the higher degrees in law, and affording to students ambitious of becoming scholars an opportunity of studying law as a science, and of rounding out their legal acquirements with a knowledge of the more profound and philosophical principles of jurisprudence as set forth in the works of the great jurists of this and other countries. It is the work done in such professional schools which led Professor Brice to say in *The American Commonwealth*: "I do not know if there is anything in which America has advanced more beyond the mother country than in the provision she makes for legal education." To Judge DILLON and to Yale we owe the book now before us, which consists of a series of lectures delivered before the University by the author when he held the Storrs professorship, and will tend to establish still more firmly our title to such high praise from foreign scholars. It is a work which every educated man, whether lawyer or layman, will read with delight. The heavy paper the beautiful typography, the digest of each lecture in the table of contents, and of each paragraph on the broad margin of the page, the table of cases and of authors cited, and the

full index, combine to make the book one of which its publishers may be proud, and "The Laws and Jurisprudence of England and America" are treated by the learned author with that lucidity and grace of diction which always characterize his writings. The first four lectures deal with "Our Law in its Old Home—England." Beginning with definitions of law and of jurisprudence, our author expressly states that he does not mean to include in "our law" either the moral law, or the science of politics, but merely "the law of the land as it actually exists in distinction from what, in the view of the law reformer or of the legislator or of the jurist, it is conceived or believed it ought to be," but he leaves us in no doubt as to his own belief in the intimate relation of the two sciences of Ethics and Jurisprudence. "Ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live. Any man who in good faith obeys the dictates of a pure and honest heart, whose civil conduct towards his fellow men is guided by the sense of justice and right, which is graven on his heart by the Supreme Law-giver, will find such a course of conduct, except in the rarest instances, to be in perfect conformity with the requirements of the laws of his country. This is to me conclusive proof of the social and ethical nature and foundation of our laws."

The education and discipline of the English Bar, and the history, character and purposes of the Inns of Court, are treated at length, and a long and interesting note on their literary associations gives us fascinating details of the relations sustained to the Inns by such men as Beaumont, Bacon, Fielding, Smith, Lamb, Thackeray and others.

"Our Law in its New Home—America," is the subject of the next three lectures, and its expansion, development and characteristics in the political and judicial systems of our own country are given with a fulness of detail and a clearness of statement which leave nothing to be desired. Confessing that the English law lacks the artistic symmetry of its great rival of continental Europe, our author, nevertheless, is in no doubt

as to its superior adaptation to the institutions and character of the English and American people, because it is pervaded by a spirit of freedom which is essential to a self-governed people. He dwells with pardonable pride upon our written constitutions as the unique feature of American legal institutions, and says: "History affords many examples where the holders of political power have been forced to surrender or to curtail it for the general good; but the example of the people constituting the American political communities in limiting, by their own free will, the exercise of their own power, stood alone when this sublime sacrifice was made, and it has not been followed in any country in Europe, nor successfully put in operation elsewhere than in the United States."

No higher eulogium has ever been bestowed upon the Fourteenth Amendment to the Constitution of the United States than that given by this book, where our author says: "I believe it will hereafter, more fully than at present, be regarded as the American complement of the Great Charter, and be to us—as the Great Charter was and is to England—the source of perennial blessings." We are a little disappointed, however, in finding no expression of recognition of the great work done by Charles Sumner in the reconstruction legislation, and we look in vain, in the index of authors cited, for the name of that eminent American jurist.

The concluding lectures of the book are occupied with a discussion of the excellence and defects of our law, and a critical review of the nature and influence of the labors of Blackstone and Bantham as types of the conservative and radical forces to whose free play it owes its progress and character. Commenting upon the complexity of the problems with which American lawyers have to deal—a complexity arising from our dual governments—our author, in a passage of great beauty (too long to quote; see pages 218–19), shows how the States form an effective bulwark against centralization; he considers at length the scope and consequences of the doctrine of the authoritative force of judicial precedent, and the uneven development of case law; he predicts that the near future will see the union of legal and equitable rights and

remedies now unfortunately separated; and he earnestly appeals for a deliverance from the present chaotic condition of our law of real property, which, although much improved by many important changes in this country, yet remains full of complex subtleties and refinements.

The views of an author of such wide experience and profound scholarship on the live legal questions of the day are of deep interest to the profession. Judge DILLON thinks the disfavor with which many of our best lawyers look upon trial by jury in civil causes is deeply to be regretted, as he considers it an essential part of our judicial system, tending to support and perpetuate our free institutions. He has observed how readily Supreme Court Judges agree upon questions of law and how often they disagree upon questions of fact, and in this connection he denounces the *scintilla* doctrine, which prevails in some of our States, and approves the position taken by the Supreme Court of the United States that no case ought to be submitted to a jury where the evidence in favor of the party asking the submission is so weak that a verdict in his favor ought to be set aside by the court. The English judges, he tells us, are selected from the most eminent of the profession, and have a permanent tenure and ample salaries. Here in Pennsylvania, where we have an elective judiciary, where judicial salaries are oftentimes inadequate, and where it is the exception rather than the rule to find our greatest lawyers on the Bench, we may well envy our more fortunate professional brethren across the sea. Pennsylvania lawyers will also read, with an approval born of suffering, the strong denunciation, by this experienced judge, of the refusal, by appellate courts, to allow full argument at the Bar, and the haste with which such courts dispose of important cases, as if their highest duty was not to do justice but to clear the docket.¹ The practice of assigning the record

¹ Fortunately, the appellate courts in many of our sister Commonwealths are not so crowded with causes as in Pennsylvania. A justice of the Supreme Court of Errors of Connecticut has said that his duties on that Bench leave to him much leisure for study, and Mr. James C. Carter, of New York, recently expressed his surprise at and disapproval of the Pennsylvania rule limiting counsel to a half-hour argument on each side in terms which led the writer to believe that the "hour list" was unknown in the appellate courts of the Empire State.

of causes submitted on printed briefs to one of the judges to write an opinion, without a previous examination of the record and arguments by the judges in consultation, ought, our author thinks, to be peremptorily forbidden by statute. "With an enlightened Bar and an intelligent people," says Lord Brougham, "the mere authority of the Bench will cease to have any weight at all, if it be unaccompanied with argument and explanation."

Liberty, one of the great fundamental rights guaranteed by our National and State Constitutions and respected and protected by our legislatures and courts, our author finds, has been violated by the decision of the Supreme Court of Pennsylvania, affirmed by the Supreme Court of the United States, that the legislature could constitutionally prevent a man from pursuing what ought to be, when carried out without deception, a lawful business, the manufacture and sale of oleomargarine.

Perhaps no part of this book will be read with more interest by the profession than that relating to codification. With the judicial reports in England now numbering three thousand volumes, and in this country not less, and increasing in both countries at the rate of one hundred and fifty volumes a year, it becomes an important question whether this multiplication of books is to go on indefinitely and, if not, how it can best be checked. Moreover, our condition in this respect being worse than that of England, the question is of paramount importance here. American lawyers may as well admit among themselves that there is much truth in the report of the American Bar Association Committee when it says, "A single word expresses the present condition of the law—chaos. Every law suit is an adventure, more or less, into this chaos." Our author does not hesitate to dwell upon the want of certainty, the want of publicity, and the want of convenience of our law, and says that Tennyson has "drawn with the sober pencil of a judge" the picture of

"The lawless science of our law,
The codeless myriad of precedent,
That wilderness of single instances."

Under these circumstances it is no wonder that men of broad culture are very apt to find the details of practice repugnant to their mental habits, and easily become disheartened at the delay and uncertainty in the administration of American law. We venture to assert that it requires no depth of learning to enable one successfully to practice law, and, on the other hand, that it is no sign of a lack of intellectual vigor that a man fails as a practitioner. Both Blackstone and Austin were saved from successful practice for the more enviable and more lasting, because more unattainable, fame of great jurists, and their renown will be as immortal as the principles of English jurisprudence. To one who witnessed that long-fought battle of Saratoga (not that of 1777 but that of 1886) when the advocates of codification, under the leadership of those giants in debate, Daniel Dudley Field and our author, after earnest conflict, at last won a victory—to such a one the position taken in this book seems very conservative, and we presume that few students of the subject will read, without at least a certain measure of approval, Judge DILLON's careful conclusions on this subject, where, after defining a code, he expresses the opinion that codification *en bloc* is not feasible, says that his idea of law amendment is that of Lord Bacon, and quotes, as expressing his own idea of a code, these views of Mr. Justice Stephen: "A code ought to be based upon the principle that it aims at nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries." "In this practical sense, within these conservative limits, a code in England and a code in each of the United States is," our author thinks, "manifest destiny." For such a scholarly restatement of the law the American Bar will have need of the learned jurist and the profound legal philosopher. While we agree with our author in his approval of Bentham's views as to the inestimable value of the English law reports, and in his judgment that our code must not presuppose that the Roman law is superior in matter, substance or value, to our own, we question whether he estimates as highly as he ought the need of a careful study of the Civil law by those on whom may possibly

fall the duty of doing for their own age what the great Roman codifiers did for their time. Such men cannot afford to neglect the study of the greatest code known to the world, that *Corpus Juris Civilis*, which Maine revered because "our law once will be like it."

The last lecture of this most interesting work contains a rapid review of the progress and development of our law during the past century and of the important contributions thereto made by the United States. In this review the author quotes largely from an address of Judge Baldwin, and the paper of Mr. David Dudley Field on "American Progress in Jurisprudence," prepared for the Columbian Exposition. In the statement of recent specific changes in our laws upon subjects of great and permanent concern, it is interesting to note that the Pennsylvania Constitution of 1776 began to open the prison doors of insolvent debtors in America more than sixty years before the first act on the subject was passed by the English Parliament.

"In the august counting of nations," Judge DILLON thinks, "America is rapidly discharging, in law and literature, her great indebtedness to Europe," and of this work, we might add, our author is doing a noble part. Having completed his retrospect of a century's progress, he ventures upon a forecast of the century to come, and we close the volume filled with a grand hope for that future when "the Old World may become the acknowledged debtor of the New"—inspired by a feeling akin to that awakened by Whittier's noble lines:

"I hear the tread of pioneers
Of nations yet to be;
The first low wash of waves, where soon
Shall roll a human sea."

G. G. M.

THE RISE AND GROWTH OF ELEVATED RAILROAD LAW. By
THEODORE F. C. DEMAREST. New York: Baker, Voorhis
& Co. 1894.

This is a New York book, and particularly a New York

City book. In a table of over two hundred cases, only two cases are cited other than New York cases. The book is really a history of the growth of an elaborate system of law, relating to elevated railroads in New York City. The most interesting chapters in it are those devoted to an explanation of the aerial property right in the streets in New York City by abutting property owners who have no fee in the surface of the streets. The great difficulty in the way of the land owners in their heroic struggle for damages lay in the fact that, under the Constitution of New York, damages could only be recovered for a "taking" of private property, and as the municipality and not the abutting owners had the fee in the street, it was difficult for the court to establish an actual taking. The courts seem to have solved the difficulty by making a distinction between a street, use of a street, and a non-street use. A railroad constructed upon the surface was considered a street use, and for this no damages could be recovered, but when the railroad was elevated above the surface it was considered a non-street use, and it was held that there could be no lawful obstruction to the access of light and air to the detriment of the abutting owner. The property right in the abutting owner was then found to consist substantially of a right to have the street used exclusively as such, and for no other purpose. It must be confessed that, to the candid observer, there was a very serious stretching of logic in establishing the existence of this peculiar kind of property; but the end justified the means, for it secured compensation to thousands of persons who had been grievously wronged by the oppression of powerful corporations.

As the question of rapid transit, by means of elevated railroads, is one which will no doubt become important in many of our large cities, Mr. Demarest's interesting account of the law relating to such roads in New York, will have a large number of appreciative readers. The book is well printed, and contains an index which, though brief, seems adequate, and an appendix containing a short account of the elevated railroads in Chicago, and their legal status.

A. B. WEINER.

THE
AMERICAN LAW REGISTER
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REVIEW

JULY, 1894.

THE PROPER PROVINCE AND OFFICE OF CON-
STITUTIONAL LAW.

BY HON. WILLIAM H. RUSSELL,
Ex-Governor of Massachusetts.

The wise Bacon, in "marshalling the degrees of sovereign honor," gives the first place to the founders of states and lawgivers, that is, to the publicists and statesmen who establish the fundamental law of the people. As the field is worthy of the highest ambition, so is the subject full of deep and momentous interest. It deals alike with the greatest nation and its humblest citizen; it controls life, liberty and property; in its study have been gathered all the treasures of philosophy and history; in its development have been waged wars and revolutions; through it have come self-government and free institutions as the crowning triumph of a progressive civilization. To us of Anglo-Saxon blood, whose heritage is centuries of conflict over constitutional law, who here have wrought out in fullest development the precious liberties it can give, it never is inopportune to dwell upon the subject or to discuss any of its many phases.

I take then as my subject "The Proper Province and Office of Constitutional Law," meaning not to consider constitutional law in its breadth and detail, but rather the limitations upon it, and especially its sphere as distinguished from statute legislation.

The modern tendency in many of our states frequently to change their constitutions, the birth and growth of new schools of political thought, each clamoring to have its policy engrafted into fundamental law; the development and clash of powerful class influences struggling for control of the body politic; the undisputed right of the majority to make its will law—these suggest, as pertinent and pressing, the inquiry, how far shall a constitution—itsself a limitation upon the power of the people, itsself organic, supreme, permanent—be used to register the will of the then majority, and to restrict, control or supersede statute legislation? The question is not as to the merit of any proposed measure, nor as to the right of the people to make it law, but only where in law is its proper place. The fact that in our greatest state there is now in session a constitutional convention, which, in dealing with the wishes and wants of her conservative people, must be confronted with this fundamental inquiry, may give a present, practical interest to its consideration.

Necessarily the question reaches far back into the past. Who can determine the scope of constitutional law in ignorance of its sources? Or fix its proper limitations without regard to history or precedent? "Constitutions are not made, but grow," are the familiar words of Sir James MacIntosh, and true alike of written and unwritten law. "The American constitution," says our ablest English critic, "is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring it is likely to prove. There is little in that constitution that is absolutely new. There is much that is as old as Magna Charta." And he calls "the spirit of 1787," when our national constitution was drafted, one "which desired to walk in the old paths of precedent." "No one familiar with the common law of England," says Mr. Justice Miller, "can read the constitution of the United States without observing the great desire of the convention which framed that instrument to make it conform as far as possible with that law."

"Although the framers of our constitution," says a recent

writer, "were without any grasp of the modern conception of the historical continuity of the race, they revered the ancient constitutional traditions of England. And thus it came to pass that Magna Charta, the acts of the long Parliament, the Declaration of Independence and the constitution of 1787 constitute the record of an evolution."

It is easy but hardly necessary to multiply these authorities. Mr. Stevens, in his able work on the sources of our constitution, has carefully collated many of them to establish the fact of the "historical development" of state and national constitutions from "the English constitution itself, considered not merely as a theory or an ideal, but as a contemporaneous fact, and as an essential element in American political experience." And our own Lowell, who, perhaps, better than any American, has understood and stated the vital principles and high ideals of our Democracy, notes, as the key to the success of our constitution, that its framers "had a profound disbelief in theory, and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such a vesture of thought and expression as they were meditating."

The evolution of our constitutional law, while it cannot be stated with scientific precision, still can be traced back through certain definite stages which mark its growth and progress.. We can see through the dim vista of centuries the germ developing ever into higher and more perfect life; we can note its struggle and the constant survival of its fittest elements; we recognize the paternity, trace the ancestry, though unable always to determine just when and why it acquired a specific character.

Our national constitution sprang from our pre-existing state constitutions, and was the work of educated statesmen thoroughly grounded in their principles. The state constitutions were the outgrowth of earlier colonial charters and constitutions, and embodied the fundamental principles and rights

which had dominated our colonial life, and found full expression in such typical instruments as the Massachusetts body of liberties of 1641 and the later Virginia bill of rights: Contemporaneous with this early constitutional life, yet, also, long before it, as its source and soul stood the common law and constitution of England. The work of centuries wrought out in battle and bloodshed, establishing precious rights each the concentrated result of a mighty agitation, they had become the guaranty of our liberties, a controlling influence of our life, culminating in our Declaration of Independence and revolution, because the mother country disregarded these rights which her own law had given us.

The Bill of Rights of 1689, the Act of Settlement, the *Habeas Corpus* Act, the Petition of Right, and Magna Charta, first and greatest of all, governed us, whether in England or of England, with the same authority as others of Anglo-Saxon blood. Coke in maintaining the independence of the judiciary against royal interference: Sir John Eliot, Pym and Hampden in their contest with Charles I, were asserting principles of self-government which for all time were to be the very foundation of republican institutions; and the bold Barons at Runnymede, wresting from their King a limitation on his power, and a recognition of rights in the governed, were blazing the path for modern constitutional law. We but share the fruit of a struggle "into whose labors we have entered."

How fully the early colonists recognized and asserted their right to share in the laws and liberties of England is seen in their official action.

Massachusetts, in a petition of the General Court to Parliament in 1646, asserted that her government was framed according to her charter "and the fundamental and common laws of England," and the proof was given, says Mr. Stevens, "by setting forth in parallel columns the fundamental laws of England from Magna Charta and their own laws." As early as 1635, in answer to the demand of her people for a written constitution, the duty was entrusted to a commission to frame "a body of grounds of law in resemblance to a Magna Charta."

Virginia, in 1619, had established her own Assembly or

Parliament, whose example, Story says, "was ever afterward cherished throughout America as the dearest birthright of freemen." Two years later from the company in England came her written constitution, "the earliest for an American commonwealth . . . modelled after the unwritten constitution of England, . . . the historical foundation of all later constitutions of government in this country." In 1623 she asserted her exclusive power of taxation, and in 1651, by treaty with the long Parliament, obtained full recognition of her right to self-government.

Connecticut as early as 1639, assuming the authority, established her government, "the first written constitution" ever enacted "by the independent act of the people."

In Maryland, in 1638, it was enacted "that the inhabitants shall have all their rights and liberties according to the great charter of England."

Similar provisions will be found in the charters and early laws of all the original colonies. In legislation and action the colonists asserted their right to the "liberties, franchises and immunities" of England who "had given them her law, her language, her religion and her blood." Thus we trace back our legal ancestry through the centuries. The English constitution was our constitution; the colonial charter was "a sort of skeleton constitution which usage had clothed with nerves, muscles and sinews till it became a complete and symmetrical working system of free government;" and our later constitutions, national and state, sprang from the same common source, deep-rooted in ancient English institutions.

And now we stand at the close of more than a century of free, independent, constitutional government, with the battle of civil liberty won and its results established in permanent law. I need not in this presence trace the history of the conflict. It is sufficient to recall that it marks a long and slow, though mighty, evolution. If we cannot find the earliest germ of constitutional law, we can see its development, note the influence upon it of many a master mind from Aristotle to John Adams; point out the great landmarks of its progress, and then confidently declare it not a manufacture or invention, but

the necessary outcome and growth of the past intelligently developed and applied to the present. As progress has been its vital principle as thus it lives and moves and has its being, so will it surely in the future, as in the past, readily adapt itself to the need of society and the demands of civilization and national growth.

The reader remembers the thought expressed by Sir Henry Maine, that society, in its opinion and necessities, is always in advance of law; that the progress of the one and the stability of the other make a gulf between them, often closing, often opening; but that "the greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed." The same principle is recognized by a later writer, who declares that "the close affiliation existing between the organic law and the historical life of any country is the one fundamental condition which insures the endurance and flexibility of that law. Indeed, the constitution can hardly be regarded as the organic law unless it be a true expression of the organic life of a people." Organic law cannot be "made to order," nor "a successful government introduced into a country by mere importation."

"No social organism can accept as the law of its being an empirical constitution made to order as a theoretically perfect solution of the problems of political life. The fact has been too little recognized that the evolution of society involves the development of institutions."

If constitutions grow, ever developing to meet the larger life of a progressive people, and to bring that life under the reign of law rather than force it discontented to the point of revolution, which, after all, may be, as Spencer says, but "the act of restoring equilibrium" where "incongruity between character and institutions is the disturbing force," we must assume that unchangeableness is neither a necessary condition of the stability of a constitution, nor a certain test of its success. Yet, it may be true, is true, that with us the fundamental principles of constitutional law are permanent and the lines are marked which should define and limit its change and growth. The child changes, grows to cope with the tasks

and responsibilities of manhood; but the evolution of centuries determines the law and limits of his growth, and makes it normal, healthy, leaving within them ample room for his activity. So safety and strength depend not upon the rigidity of constitutional law which may stunt the life of the social organism, but rather upon a flexibility itself controlled by fixed and fundamental principles.

Recognition of this fact makes it easier to deal with the problems of our day.

We live in an age of unprecedented material progress and marvelous scientific and physical development. Inventions, bridging the separation which time and distance create, have brought nations into closer touch and vastly broadened the field of human effort and ideas. Science, daily turning labor from muscles to machinery, and wealth, with its accumulations and power, sharpening the line of class distinctions, both furnish work for the economist and statesman. General popular education, with the school, the church, and public discussion everywhere, and a free press with its mighty power, have given intelligence activity, and made agitation the forerunner of progress and law. Even bayonets seem to flash with thought, striving now less for conquest than for peace and law and order. Under these conditions it would be strange, indeed, if social progress, accelerated by material prosperity and voicing aloud and everywhere its needs and wishes, did not seek the "lawful revolution" of constitutional change; strange, too, if the individual, with his fuller power and keener intelligence, in the universal struggle for improvement, for a larger opportunity and more of liberty and happiness, were content to measure his rights and claims by the fundamental law of the present or the past, rather than by such changes as shall more fully embody the great principles of justice, equality and humanity which have come down to us alike from the "rugged sides of Sinai" and "the gentle slopes of Olivet." The ideas of our progressive age and liberty loving people have no more crystallized into a full and final development of constitutional government than has religion in the creeds and apologetics of the medieval ages. "More light," says Robin-

son, "will constantly break forth from God's word." But the dark and narrow creed which could not let the daylight in bred schism and heresy; and the world applauded and progressed. More light is constantly breaking forth from a progressive democracy, which, if excluded from a rigid constitution, may find a place in discontent and revolution.

We need not be disturbed then if as lawmakers we find ourselves confronted with problems new, perplexing and momentous. They may be but the evidence of life, activity, progress in the body politic, and an inspiring test of our wisdom, courage and patriotism. If on the one hand we stoutly resist the demand that constitutional government shall either abdicate in favor of anarchy, or assume the paternal duties of the patriarchs of tribal days, or the later village communities, let us not on the other hand give way to that unprogressive conservatism which sees danger in the slightest movement of the ship of state, though it be but the paying out of sufficient cable to allow her to breast the rising winds and tides with safety and success. Between the two is a safe and proper course, which we can take, fearing not the gorgon head of anarchy, nor the wrinkled face of Bourbon conservatism, nor even the siren voice of socialism and paternalism.

We recognize the right and need to narrow or bridge the gulf between society and law; but insist that this cannot be done either by the abrogation or stagnation of law or by substituting it for the functions of society. It can be done by change, and safely, wisely, when such change is of law; and, if of organic law, within the lines which mark its proper scope and office.

And so, after some wandering, we come back to the path upon which we entered this broad field of constitutional law. We have found that our subject takes us far back into the past; that constitutional law has been an evolution out of centuries of strife and progress; that this history is our history; and that in our colonial days and later "the constitution of the mother-land had been more than an ideal model; it had been a vital factor in the life of the American people."

We have observed that growth is its constant rule, and will be so long as society advances; that its change in our progressive age is natural, often necessary—but that such change is or ought to be upon fixed principles which define and limit it.

To ascertain these principles we must consider the purpose and object of constitutional law, and again turn to history and precedent for its origin and evolution.

A constitution is government and government by law, establishing its principles, dividing and regulating its powers and directing its administration. The purpose of a constitution "is to establish a framework of government and to provide in outline for its powers and functions." As government merely, it has existed since man's creation; however crude, tyrannical, or paternal, it has sought to regulate his relations to his fellow men as members of society which it controlled. We need not follow John Locke in his discussion with Sir Robert Filmer back to the Garden of Eden, where he finds a justification of despotic government in the power there conferred upon Adam, to be convinced that government is as old as the human race, and that its primal principle was control, pure and simple. Then through ages of evolution and revolution grew a second great principle—that of compact, consent, with a recognition of the governed as well as of the governing class.

Without attempting to trace the evolution in the dimness of the past, we can see three stages of development in government before the principle of compact was established. First, the paternal control of the era of Abraham, Isaac and Jacob over a pastoral life and country thinly populated, where the only constitution necessary was the paternal word. Then as the people multiply and segregate in tribes, we see paternal merging into tribal government, yet, still control, arbitrary and unqualified. Such was the theocracy ruling the tribes of Israel. There is no hint of compact or consent in the Ten Commandments, or in the regulations established for the "chosen people." The law of the Pentateuch is only "thou shalt" and "thou shalt not." Then with increasing population and its closer union came the dawn of national life, and

with it the germ of compact, the first faint recognition of the right of man to a voice in the government which ruled him. History does not tell us when this germ originated. Left to surmise, we may fancy we see it developing upon the plains of Troy, in the haughty rebuke of Ulysses of Thersites :

But if a clamorous, vile plebeian rose,
Him with reproof he checked or tamed with blows.
Be still, thou slave, and to thy betters yield,
Unknown alike in council and in field.

Certainly it was early found in national government, and once there it could not be eradicated. Neither the inroads of Goths and Vandals, nor the regime of ecclesiasticism, nor the servility of feudalism, nor the divine right of kings could destroy it—only at best check for a time its growth.

So constitutional law established on the principles of control and compact grew and developed. While we appreciate the influence upon it of Greece and Rome with their recognition of some of its fundamental principles, we know that our constitutional law comes not so much from these classic sources as from our fighting Anglo-Saxon forefathers. In their blood was less of submission than assertion. Out of their contests came rights by consent to supplement control by authority, and make a well-rounded government. Henceforth control was tempered by compact. Thus came Magna Charta, the basis of liberty and self-government of the seven succeeding centuries. "Do they think I will grant them liberties that will make me a slave," said King John, when the demand of the barons of Runnymede were made known to him. Then, yielding to a power he could not resist, he gave his assent "for the sake of peace" he said, "and the exaltation and honor of the kingdom." Here was the battle between absolute power and the right of the governed, between control and compact. Absolutism had made its last stand, and the victory of the barons placed the principle of compact in the constitution as a controlling force forever for the Anglo-Saxon race. So Magna Charta declared over the signature of the King: "To all our free subjects of the kingdom of England, we, for ourselves and our heirs forever, have granted all the underwritten

liberties, to be had and to be held, by them and their heirs, from us and our heirs."

Thus developed the two fundamental principles of constitutional law; control, to establish government and to determine its framework, but modified now by compact, to guard the rights and liberties of the governed and to give them a part in the making of law. Their constitutional bulwark was no longer to be but the uncertain and unstable pledge of the coronation oath. Control now meant representative institutions—a Parliament, and division and limitation of authority; now had come the dawn of self-government. True, Magna Charta and the Parliament of Simon de Montfort had not ended the conflict nor completed the work, but they had established a permanent principle, potent in influence and certain of growth. Kings might insist upon absolute power, but were forced by the people to constant reaffirmation of the great charter, with larger liberties for the people and further limitations on the crown. Control by Parliament of taxation and law, trial by jury, imprisonment only by warrant and responsibility of the king's officers were some of the principles evolved by the time of Henry VII out of the protracted struggle. A Henry VIII might still, with the consent of a submissive Parliament, call royal proclamations law, and establish the star chamber; the Stuarts might plead again the divine right of kings, and servile judges might deride the power of Parliament as a "king-joking policy;" but they were only paving the way for petitions and bills of right, and *habeas corpus* and succession acts, and inspiring the Cokes and Hampdens and Cromwells to assert the rights of the governed, and to make compact, consent, the dominant power of their organic law and freedom its inevitable result. No longer was it true, as the Commons had once meekly declared, that "prerogatives of princes may easily and do daily grow; the privileges of the subject are for the most part at an everlasting stand." Constitutional law was developing out of the conflict; nay, more, was, with its precious rights and liberties firmly established, and a king had suffered death "for subverting the constitution of the realm."

Such work and struggle, let us not forget, were the begin-

ning and basis of our American constitutions, as they were also the precedent, justification and incentive for our revolution and national existence. The thirteen colonics, now independent in fact, were wholly dependent in law, upon their charters and the constitution and common law of England. This made with them constitution building a necessity. I have already sketched the connection of our early charters and later constitutions with the organic law of our English ancestors. In them is the same recognition of the principles of control and compact, only with larger growth and fuller development.

Out of the necessity and principle of control has come our frame of government, national and state, with its divisions and functions carefully arranged and specified; and control modified by compact has made this representative and self-government. All that secures this, necessarily, has place in a constitution, because, necessarily, fundamental law; and within it, as even more fundamental, are properly found regulations of the suffrage, by whom and how it shall be exercised. The constitution of the body politic must precede the exercise of power by it, and if not as permanently fixed as the law it makes, becomes the helpless subject of its own creation. Any policy, therefore, approved by the people, which deals with the qualifications or exercise of the suffrage, or affects the frame of government or changes its scope or functions, has its proper place in constitutional law. Should, for example, the doctrines of Socialism or Nationalism ever prevail, they should, because of their radical change of the purpose and principles of our government, find expression in constitutional law. Our excellent Australian ballot law, controlling the exercise of the fundamental right of suffrage, might well have its principle embodied in the constitution, leaving its details for legislative enactment.

A constitution then necessarily defines the body politic and creates a government, and properly contains in principle, at least, whatever law is to control them. But it also must secure individual liberty so far as is consistent with such government and the rights of others, recognizing, in the words of Herbert Spencer, "that every man may claim the fullest liberty to

exercise his faculties compatible with the possession of like liberty by every other man ; " that " a Democracy is a political organization modelled in accordance with the law of equal freedom," and that " of all institutions which the imperfect man sets up as supplementary to his nature, the chief one must have for its office to guarantee his freedom."

Out of the principle of compact sprang this constitutional safeguard of liberty. Making government rest upon consent, it made a condition of such consent protection of an individual or minority in certain rights against the dominant power, be it king, parliament or a majority. A sovereign people consented to limitations on the exercise of its sovereign will.

Controlled by these two principles, every American constitution embodies two fundamental ideas—a frame of government and body of liberties—the one to provide for the full exercise of power by a majority, except as limited by the other to guarantee the free exercise of rights by the minority. I need but briefly refer to the detailed provisions, for my purpose is not to enumerate the contents of a constitution, except as may be necessary to illustrate its sphere and function. They are clearly stated in the Massachusetts constitution of 1780, which was the type substantially followed by other states. The frame of government naturally provided for three distinct and independent departments—legislative, executive and judicial. This was in accord with the then widely accepted philosophy of Montesquieu, the authority of Blackstone, the real principles of the English constitution, and with our past experience. In England, at the time of our early constitution making, the three powers had long since ceased to be centered in the king. Out of her experience and emancipation the French philosopher and English jurist had evolved and declared the principle that liberty depended upon the separation of these powers. Earnestly believing in self-government and liberty, the framers of our constitutions made the legislative department thoroughly representative, and the all important, responsible branch of a republican government, with power, subject only to constitutional limitations, frequently and fully to enact the people's will. The other two branches, equally necessary and co-equal in

rank, in legal effect were merely agents to enforce legislative action within the sphere of its power. The judicial department could create no right. Its power was limited to the construction of written or unwritten law. The highest judge was as much hemmed in by law as the humblest criminal in the dock. Equally limited in its scope was the power of the executive department to supervise the administration and enforcement of law. The three departments were independent, each supreme within its jurisdiction, and yet the law making power was clearly and designedly the dominant branch of government.

These necessary powers of a constitution, determining the frame and scope of government, suggest control rather than liberty, however representative our institutions. Government compels submission to its authority, but its compulsion also necessitates a guaranty of protection, especially against the arbitrary action of any of its departments. We need not base this guaranty on Rousseau's theory of a social contract where "allegiance was agreed to be exchanged for protection;" nor upon Spencer's extreme extension of the law of equal freedom, which "admits the right of the citizen to adopt a condition of voluntary outlawry." We claim it through our Anglo-Saxon ancestors who wrested it by force from rulers, and made it as permanent and potent as government itself.

At the time of our national independence the evolution of constitutional law had reached the definite point that popular rights, as against the ruling power, could only be intrusted to established written guarantees, and that these were as necessary in a popular government vested in a majority as one of a more absolute character. Such guarantees, therefore, were embodied in our written constitutions, and covered what were felicitously called in our declaration "certain unalienable rights with which man is endowed by his Creator, among which are life, liberty and the pursuit of happiness."

These are more fully set forth in the constitution of Massachusetts as "the right of enjoying and defending life and liberty, of acquiring, possessing and protecting property; in fine of seeking and obtaining safety and happiness," and specifically stated to include freedom of conscience and worship,

trial by jury, right of petition and self-government, freedom of debate and the press, freedom from improper arrest and martial law, right to compensation for property taken for public uses, and other rights equally familiar.

To these provisions, establishing government and guaranteeing rights, were added certain fundamental duties of government to its constituency, which were clearly and universally recognized as necessary to secure public safety and happiness, and so were imperatively enjoined upon the sovereign power by the organic law, as *e. g.*, the duty of cherishing public schools and the interests of literature and the sciences.

These general principles and provisions cover the whole scope and extent of our early constitutional law and clearly point out its limitation, and the lines of its progress and development. They leave great latitude to the people for legislation; and seem to recognize almost as a third great principle of constitutional law, certainly as a deduction from the principle of compact and self-government the right of the people frequently and easily to change their laws. This is expressly declared in the constitution of Massachusetts. It means that as needs appear and the state develops, as new policies or beliefs are accepted by the people or, in its own words, "as the common good may require" there shall be opportunity to make them law. As the occasion arose, there was to be unrestricted power to deal with it. The constitution was not like a rigid creed to be a barrier to shut out "the more light" which marks the progress as well of society as religion; nor yet was it to be as changeable and unstable as the legislative will. But broad in its scope, without unnecessary restrictions, general, expansive in its principles, simple and terse in its provisions, it was in fact to be permanent, fundamental law, rather than a restraint upon legislation, or itself legislation, or the instrument to enforce the will of temporary, fleeting majorities. It was to establish the lines of government rather than do the work of governing; that was left to the instruments it created.

This limited sphere of organic law is clearly seen in our national constitution. It created a government of specified

powers granted by the states, but absolute within their scope. In the statement of these powers and in guarding individual and state rights, it closely followed the form and primal principles of the earlier state constitutions. It does not undertake to legislate or to limit legislation except of states where necessary for national supremacy; but is content in terse and comprehensive language to establish a frame of government, define its powers and then declare its body of liberties. In less than thirty words it created our whole national judicial system, not by elaborate specification, but by grant of ample authority to its legislative branch. In eight words it established the admiralty and maritime jurisdiction of its courts, giving by the very absence of detail the power to its judicial department to meet the pressing exigencies of the country and its progress, and, by magnificent judicial evolution, to broaden this exclusive jurisdiction from the ebb and flow of the tide, so as to cover every league of navigable water within our continental domain.

It would be easy to multiply similar illustrations from national and state constitutions, showing their purpose to be on broad lines to establish government and safeguard rights, leaving detail and enforcement to legislation, and the people free to act through their representative institutions under a limited restraint; and recognizing the fact that the needs of a progressive social organism can better be met by freedom from constitutional limitation than by constant constitutional change.

The unwritten constitution of England, wholly under the control of a sovereign Parliament, flexible, expansive, yet with permanent principles and rights, has readily, safely permitted a growth and change of institutions with the progress of the nation, even enabling her in 1832, "to carry through a political revolution under the guise of legal reform." While in England, as Mr. Dicey points out, "laws are called constitutional because they refer to subjects supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws," and while with us both tests are present, but the latter supreme—yet there and here the truth has been recognized

that "the endeavor to create laws which cannot be changed is an attempt to hamper the exercise of sovereign power;" and so "tends to bring the letter of the law into conflict with the will of the really supreme power in the state." We obviate this difficulty, not by putting our constitutions within the control of the legislative power, trusting only to its conservatism to uphold fundamental rights and principles, but reserving these with reliance on a supreme judiciary for their maintenance, we have found safety and growth by giving the people ample power to legislate, and yet have insured the stability of rights and institutions.

Our national constitution is an excellent illustration of the success of this policy. Its system of constitutional government, with its comprehensive general principles and broad powers sufficiently elastic to allow of expansion by proper construction, yet sufficiently distinct to be effective and protective, has stood the test of more than a hundred years, carried us through foreign wars and civil conflict, adequately met a phenomenal increase of population, wealth and area, with its new and momentous questions, skilfully adjusted the delicate relations between state and nation, and governed as efficiently 70,000,000 of people scattered through forty-four states, reaching from ocean to ocean, as the small population of the narrow coast line which embraced its thirteen original constituents. Yet during ninety years of this marvellous growth and change, it has required no amendment except to make permanent the grand results of the civil war. Speaking of this act of the sovereign power of the United States, says Dicey: "It needed the thunder of civil war to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity." If so I may add it will not be because "the monarch slumbers," but because he is contented. Admirably has the national constitution fulfilled its purpose "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty," all proper, necessary constitutional duties. Its success has demonstrated that a constitution, to be efficient and

permanent, and yet adapted to the progressive development of the future, should be comprehensive, not minute; contain principles, not measures; establish fundamental rights, not petty restrictions; give large powers to its departments, and leave specific legislation, which may be the transient product of spasmodic excitement, not the people's will, but their whim, within their power freely to control.

An examination of our numerous state constitutions will show that in recent years there has been a marked tendency in the opposite direction. I have not time nor your patience to consider the facts in detail. A few references will be perhaps sufficient.

Down to about 1850, all of the state constitutions, following, substantially, the models of Massachusetts, Virginia and the United States, contained only a bill of rights and a frame of government, the latter established under comprehensive provisions, upon a broad basis and with large powers. Thereafter, and in a constantly increasing degree, these constitutions grow longer, more elaborate and detailed, especially in their restrictions upon legislation and in the exercise therein of legislative powers. This tendency seems to have been most marked about 1850, from 1870 to 1875, and in the new constitutions of the last few years; and, while widely prevalent, to have found fuller expression in the West and South. Let me give a few typical illustrations of each period. The constitution of Illinois of 1848, increasing in length in the ratio of eight to eighteen, finds room for minute provisions as to tax sales, and, in six sections, for regulation of corporations. The constitution of Ohio of 1851, nearly twice as long as its predecessor, restricts the power of the Legislature over corporations, and itself defines their duties and liabilities. The Indiana constitution of the same date forbids the Legislature to pass local laws in seventeen specified cases, and in fourteen sections legislates in reference to corporations. Coming to a later period, we find the Illinois constitution of 1870 making elaborate limitation on the power of the Legislature, and very detailed legislation for the regulation of warehouses, railroads and corporations generally.

The Pennsylvania constitution of 1873 devotes thirteen sections to the regulation of private corporations, and twelve more to railroads and canals, and gives more than one-seventh of its entire length to detailed limitations on the power of the Legislature. The Missouri constitution of 1875, having grown since 1820, in the ratio of 11 to 31, legislates at great length upon these subjects, and minutely provides for the municipal government of St. Louis. The California constitution of 1879, among many details of legislation, prescribes the hours of labor on public works, defines mechanics' liens, and forbids any corporation, directly or indirectly, to employ any Chinese or Mongolian in any capacity. Coming to the latest period, we find the Mississippi constitution of 1891 almost a code of laws. It contains 285 sections, covering forty-seven octavo pages. With much detail it both forbids the Legislature to pass laws upon certain subjects and requires it to legislate upon others, as *e. g.*, the provisions (sec. 83) that "the Legislature shall enact laws to secure the safety of persons from fires in hotels, theatres and other public places of resort," and (sect. 186) "pass laws to prevent abuses, unjust discriminations and extortion in all charges of express, telephone, sleeping car, telegraph and railroad companies," etc., and (sec. 198) "laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare." It also incorporates the whole of an employers' liability act, requires any railroad thereafter constructed within three miles of any county seat to pass through the same, and establish a depot therein, regulates the expenses of criminal prosecutions, provides that the state printing and stationery shall be furnished under contract, that the state librarian may be a woman, and for numerous other details of government usually covered by statute law.

Instructive of the tendency of this period are the very voluminous and detailed constitutions adopted in 1889 by the new states of Montana, Washington, North and South Dakota. They seemed to be based on the belief that the political panacea for all the evils which have beset legislation in the older states is to put it into constitutional law largely beyond reach of the people. A friendly critic, reviewing them, says:

"They approach a code of laws, rather than a resume of governmental principles. They will prove unwieldy in practical administration, because they attempt to prepare the state for a great number of detailed labors. The framers seem to have thought that the governments would, at best, be intrusted to untrustworthy officials, and that it was wise, if not necessary, to set forth the details of state government, even to the definition of such terms as monopolies and railroads." He wisely adds: "A constitution aims to be a chart, based upon a large amount of experience in the conduct of government. But a constitution is not intended to teach a system of legislation, or to discuss passing problems in transportation." As one reads in these constitutions the many restrictions upon the legislative power, he is almost inclined to believe that this department was established for the purpose of declaring what it could not do, and is reminded of Dickens' Circumlocution office, whose only power was "how not to do it."

In North Dakota, ninety prohibitions are placed upon the Legislature in the single matter of special legislation; forty-five in South Dakota, and about as many more in the other two states. The courts are established and their jurisdiction defined with the detail and precision of a statute, the Washington constitution even fixing the time within which a judge must render his decision, and the North Dakota constitution requiring the Supreme Court to prepare a syllabus of the points adjudicated in each case. Apparently the legal members of the convention, whose influence, it is said, inserted this last provision, rely more on head notes than opinions, and were determined that these at least should be clear of *obiter dicta* even if necessary to invoke the power of the organic law of the state. The provisions in reference to corporations are most elaborate and detailed, and are substantially "a compendium of present corporation law, written by popular sentiment." By the creation of important administrative boards, and by the many restrictions on the legislative, executive and judicial departments, the tendency of these constitutions is to establish a sort of automatic permanent administration as a substitute for our usual form of government. This fact is

conceded by the thoughtful critic I have quoted, and is called by him a recognition in constitutional law of a "fourth department of government"—the department of administration. All but one of these constitutions provide for amendment or the calling of a constitutional convention by a majority vote of both branches of a single Legislature, ratified by a majority of the electors. Both Dakotas established constitutional prohibition after a popular vote—in North Dakota by a majority of 1159 in a total vote of nearly 36,000, thus making a permanent restriction on the people against the will of nearly one-half, and beyond their power to change, even when a majority, except by constitutional amendment.

I have referred to these constitutions somewhat at length because of the nearly 140 constitutions which have been framed in this country, they mark the widest departure from the fundamental principles of constitutional law hitherto generally accepted and adopted. I do not question the wisdom of enacting into law many of the provisions they contain, and certainly not the public spirit and high purpose of the men who framed them. But on grounds both of principle and expediency I seriously doubt the wisdom or propriety of this wide extension of the scope and office of constitutional law. These constitutions, in their numerous restrictions, in their avowed mistrust of representative government, in their excessive legislation placed beyond the convenient control of the people, in their violation of the principle of self-government, seem to have overlooked the fundamental idea upon which rests our constitutional law, and again to have set up the principle of government by control rather than government by compact. True, the control may be of a majority, not a king; but the vital question is not its source, but its extent. If it prevents the people from asserting their will, if it continues the reign of a departed majority, it is not in accord with the principles and institutions of our liberty-loving, self-governing people.

Certainly these constitutions depart from the wise advice given by our ablest authority on constitutional law. Said Judge Cooley to the North Dakota convention: "In your constitution making remember that times change, that men

change, that new things are invented, new devices, new schemes, new plans, new uses of corporate power. And that thing is going to go on hereafter for all time, and if that period should ever come which we speak of as the millenium, I still expect that the same thing will continue to go on there, and even in the millenium people will be studying ways whereby by means of corporate power they can circumvent their neighbors. Don't in your constitution-making legislate too much. In your constitution you are tying the hands of the people. Don't do that to any such extent as to prevent the Legislature hereafter from meeting all evils that may be within the reach of proper legislation. Leave something for them. Take care to put proper restrictions upon them, but at the same time leave what properly belongs to the field of legislation to the legislature of the future. You have got to trust somebody in the future, and it is right and proper that each department of the government should be trusted to perform its legitimate function."

The objections to this large and increasing extension of the province of constitutional law are serious and obvious. In the first place it seems to deny the existence of any fixed underlying principles which are to determine what a constitution should contain, and to make the supreme and only test the wish and will of the majority. Thus it opens the door, has opened it, to incorporating in a constitution the whole body of statute law. In doing this it necessarily removes from the immediate control of the people the power which governs them. It denies their right frequently and easily to change their laws, and so infringes the fundamental principle of self-government. What right, under our theory of government, has the majority of to-day, which to-morrow may be the minority, to impose its will unalterably on the then majority, except the right which relies only on might? But have not we of Anglo-Saxon blood for centuries fought that idea, and evolved the higher, safer principle, that government rests upon the consent of the governed; to be under the control, of course, of the majority, but a majority whose life and acts are themselves under the control of the people.

Otherwise it is neither a government of the people nor of a majority.

This modern constitutional growth, with its excessive government and its many restrictions firmly fastened on the people, seems also to conflict with the principle of freedom from restraint, which is the very essence of Democracy, finding expression in "such terms as free institutions, civil liberty and self-government." With its more of control and less of compact, it marks an evolution backward in the progress of civilization. "The time was," says Spencer, "when the history of a people was but the history of its government. It is otherwise now. The once universal despotism was but a manifestation of the extreme necessity of restraint. Feudalism, serfdom, slavery, all tyrannical institutions, are merely the most vigorous kinds of rule, springing out of, and necessary to, a bad state of man. The progress from these is in all cases the same—less government. Constitutional form means this. Political freedom means this. Democracy means this."

If this enlargement of the field of constitutional law is really, as suggested, the development of a fourth great department of government, that of administration, such a change, as affecting the frame of government, is within the proper scope of a constitution; yet it may be well to consider how far such department, placed by organic law beyond the control of the people, is in harmony with our institutions. It seems to bear some resemblance to the *droit administratif* of France, which has never taken deep root in Anglo-Saxon soil. While that law places the officers of administration largely beyond the jurisdiction of the courts, this fourth department would place administration itself beyond the jurisdiction of the people. Dicey says of the *droit administratif* that "it rests upon political principles at variance with the ideas which are embodied in our existing constitution," and that, "for each feature of it one may find some curious analogy either in the claims put forward or in the institutions favored by the crown lawyers of the Seventeenth century." Then commenting on the failure of the Tudors and Stuarts to establish this "strong administrative system," he declares it was "chiefly

because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions." May not we as truthfully say that a scheme of automatic administration, created by limitation of the powers of other departments, to be a substitute for and above legislation, is opposed to the long settled principles of Republican institutions? Is it not safer and better to make administration responsible to the people by leaving its system within their control? Then give it stability and efficiency by lifting its offices out of the spoils of politics, and making their tenure dependent only on merit and fitness.

Serious, too, are the objections on the ground of expediency to this tendency to put into organic law statute regulations which it may be wise frequently to change. One of two results must follow: either law, if unchangeable and discredited, loses its authority and the people become demoralized, or their constitution, often changing, loses its stability and fundamental law becomes the subject of constant agitation and controversy. Against this evil every constitution, until recent days, has sought to protect itself; first, by confining its scope within the limits of well defined fundamental principles, and next by making difficult its own amendment. It was intended, as expressed by Chancellor Kent, that "time shall be given for mature deliberation upon questions arising upon the constitution, which are always momentous in their nature, and calculated to affect not the present generation alone, but their distant posterity."

An illustration of the evil to which I refer may be found in the experience of some of our states with constitutional prohibition. However wise and necessary prohibition may be, the proper place for this much controverted restriction is in statute, not constitutional law. Dependent for its enforcement upon statute law and a sustaining public sentiment, it gains little by constitutional recognition, while the constitution itself may suffer by the evasions and opposition of a discontented people unable, lawfully, to assert their will. Referring to this danger a distinguished jurist has forcibly said, "A constitu-

tion is not a code, civil or penal; and whatever tends to turn it into one, endangers its ultimate stability by exposing it to every gust of popular excitement or caprice. . . . To put into a constitution a rule which a statute would sufficiently prescribe, and which must be supplemented by a statute to make it effective, would be simply to take advantage of the greater permanency of the organic law in the interest of a majority—for a purpose quite foreign to the purpose of that instrument; and might well argue a distrust, on the part of that majority, of their ability to maintain their ground in the convictions of the people. If this be its significance . . . it would exemplify that tyranny of the majority which the friends, as well as the foes, of democratic institutions concede to be their greatest inherent danger."

If I am right in my criticism, it must be that certain fundamental principles determine the true scope and office of constitutional law. I believe such principles have been evolved out of the experience and struggles of the past; and, speaking broadly, may be defined as the principle of control which establishes the frame of government, and the principle of compact which determines its form, guarantees important rights and leaves to the people, through power over legislation, full power of self-government. Upon these principles were based the typical constitutions of Massachusetts and Virginia, and upon them alone still they rest.

If it be argued that the modern expansion of constitutional duties is due to mistrust of representative government, and severe constitutional limitations are necessary for the public welfare, I can only answer that the argument is a confession of the failure of our institutions and an indictment of the integrity of our national character, against which I protest, and which will not be remedied by constitutional provisions. For let us remember in the words of the wise philosopher I have so often quoted, that "institutions are made of men; that men are the struts, ties and bolts, out of which they are framed; and that, dovetail and brace them as we may, it is their nature which must finally determine whether the institutions can stand. Always there will be some line of

resistance, along which, if the humanity they are wrought out of be not strong enough, they will give way, and, having given away, will sink down into a less trying attitude. . . . No philosopher's stone of a constitution can produce golden conduct from leaden instincts. No apparatus of senators, judges and police can compensate for the want of an internal governing sentiment. No legislative manipulation can eke out an insufficient morality into a sufficient one. No administrative skight of hand can save us from ourselves."

The above address was delivered at the recent Commencement of the Yale Law School by Governor Russell, by whose permission it is here printed.—*Ed.*

A LAST WORD ON CONSTITUTIONAL CONSTRUCTION.

BY RICHARD C. MCMURTRIE, LL.D.

That there are two standards of constitutional law is evident. They appear to be inconsistent when we see them applied by the judiciary and they are so, but this does not warrant the inference that the standards are faulty. When we compare the modern utterances of judges when assuming the power of disregarding the voice of the State speaking by the legislature, with the severe logic of those who first demonstrated the right of the judiciary to exercise this transcendent power, it seems impossible to find a reason to justify the apparent assumption of the right to limit the power of the State, by what seems to be so evidently the arbitrary and capricious opinions of the occupants of the Bench for the moment. The fact that there is an ethical basis for the opinion is lost sight of because the attention is occupied in the endeavor to find a justification for its application. All men accustomed to think in the ordinary lines would agree in denouncing a court that would refuse to carry into effect a law involving capital punishment because in their opinion such legislation was nothing but a survival of a barbarous age and of a cruel and blood-thirsty people. But

why this should be criminal in a judge and might be praiseworthy in a legislator does not appear to be seen at all, much less to be clearly seen. Believing this to be of the highest importance, every effort, however feeble, to stem the current that has set in this direction within a few years may be of value. It may be that the assertion of the right of the judiciary distinctly and avowedly to disregard the action or command of the State in the exercise of its legislative functions may have led to the notion that there was no other system of constitutional law than the one that conferred this power on the judiciary. It is plain to all that if there be an express prohibition on legislative action, any such action must be nugatory or the Constitution is impotent. If, for instance, Congress or a legislature should impose a tax on exports from a State all will agree that either the Constitution must cease to operate or the law must not be enforced. And if one should justify the seizure or detention of property under such a law, a court must determine which of the two commands, both having the form of law, shall be obeyed.

It seems to be a general notion that, until there were governments established or regulated by instruments of this kind, there never had been committed to the judiciary this power of declaring the action of the State, in the exercise of its law making power void. It did not exist anywhere. And so far as I am aware of, the right was first claimed by the judiciary of this country. I think all agree Lord COKE's claim is without warrant. The exercise of the power has become so frequent and the details of constitutional restraint so minute that the singular eminence of the power has been lost sight of. In this State a case has occurred that is probably one of the most ludicrous instances of the application of reasoning or logic that can be found in judicial literature. And that is, that the legislation which is void because of want of power in the legislature continues in force and is a justification for all that is done apparently until the court say it is void. There can be but one explanation of a blunder so absurd as this, violating as it does the uniform declarations of all courts, but there is a palliation in the impossible attempt to compel uniformity in

municipal powers.¹ Still no one can help seeing that, for practical purposes, constitutional law with us is confined to those instances that are embodied in the written constitutions. There are protests against this, and by men of great weight—one going so far as to declare that the reason for the prohibitory clauses is to furnish illustrations of the correct path to be pursued; *e. g.*, the prohibition of bills of attainder does not presuppose a power to enact such a bill if there were no prohibition. And then we are launched into those remarkable sentences in our national document, and are told that they embody the principles, to protect which the constitutions were made.

That there are truths, and very valuable truths, embodied in these famous declarations no one will deny. If inalienability can be predicated of the rights to life, liberty, and the pursuit of happiness, it will be admitted they are abstractions or next door to abstractions which to be useful must be embodied in concrete forms in actual legislation. Can anything be more utterly absurd than a repeal of all existing legislation that is cruel, unjust or an interference with liberty or the pursuit of happiness? Conceive of the condition of the prosecuting attorney or the Court of Quarter Sessions when called on to administer such a law. On the other hand, will any one dispute that there should be no cruel or unjust laws? That human liberty should not be unnecessarily interfered with. The difficulty is to determine what is and what is not just. Nothing exhibits this more strikingly than the rules of evidence. The exclusion of hearsay, what is it but a balance of the good over the evil. It cannot be that a rule on which all men act in all affairs can be intrinsically wrong. On the other hand who, with adequate knowledge, would desire to

¹ This amazing proposition of legal logic that in constitutional law a prohibited Act of legislation is valid for certain purposes, was decided in *King v. Philadelphia*, 154 Pa. 160, and on p. 167 it is said, "*It is not to be tolerated that the right to take private property shall be called in question years afterwards on the ground of the unconstitutionality in the statute authorizing the taking, though that is admitted and decided.*" I think the only words adequate to describe the feelings of a lawyer on reading such a judgment is abject terror.

have the floodgate opened and everything let in. Or take the rule that governs in the construction of deeds or wills.

It has appeared to me that the fallacy of the argument that sets up any abstract rules as the guides to determine the legality of the legislative action of the State can only be distinctly seen by looking at the question from the standpoint of history.

It is just as certain that we, the inhabitants of the thirteen colonies, were living under a Constitution and a constitutional government before the separation of the colonies from England, as that we were governed by English law and by Acts of Parliament. The law that governed the rights of property and persons was not changed by the separation or the revolution in the political relations of the people. In what respect was the Constitution changed? In what did it consist? It was nothing but rules that were borne in mind or ought to be whenever political or personal rights or the rights of property were being dealt with. But while these were admitted no one ever disputed the power of Parliament, that is the legislature of the nation to limit or restrict the application. There is nothing inconsistent or unreasonable in embodying some of these principles into a code which should bind the State itself until it saw fit to alter the code. If this were done this consequence must follow, as it seems to me inevitably, the residue of the Constitution remained just where it had been. It governed the legislature as it always had, just as the maxim that there should be no unjust or cruel laws.

But who shall determine this? Mr. Justice BLACKSTONE in his Commentaries has a definition of municipal law that has been ridiculed, but really embodies the whole of this subject. It is the power of the State commanding what is right and prohibiting what is wrong. Who is to determine the right and wrong? If the court are entitled to bring the legislation to this test as they do when the written Constitution forbids the imposition of a tax or duty on exports it is needless to say that the legislative power is transferred to the courts. True, it is but the negative and not the initial power. There is not any power of substitution or restriction, but if the measure of

punishment for crime be not a legislative question one may ask what is. If the power to prescribe the term of service in the field and enrollment into the army be not legislative, what is the power and what is its definition? Grant that we should relegate this to the police—that power which overrides all others, that power is certainly within legislative control. It seems incredible that any system of law can emancipate the police of a government from its legislature.

There being then two constitutional systems, one of them consisting in so much of the original inherited but unwritten law intended to govern or rather direct the legislature and all organs of the State, as the State has seen fit to embody in a written code, and by making it part of the law of the land superior to any rule of the common law or any enactment of the legislature, has given to the judiciary by implication a right to that extent to control the legislation, where does the power reside to enforce the residue of the Constitution not incorporated into the written code?

Is there any ground for asserting that the residue of the Constitution is repealed by the enactment of a part? If the position of the Constitution before anything was adopted as a code to control legislatures and executives, and subject them to courts in ascertaining the extent of their powers, is considered it is obvious that a particular restraint could not be construed as giving a license in all other particulars.

If the unwritten Constitution, prior to the adoption of a written one, served as a guide to which to appeal as far as reason or conscience could exercise sway, what is there in the fact of the adoption of a written Constitution to change the tribunal to terminate this appeal? It cannot be that all such appeals to Senate, House and Governor, are no longer legitimate on the question of legislating. Having had its influence then, what is there in the Constitution that confers the power to make the same appeal to the judges, not as aids in construction about which no one doubts, but as limits restraining the action of the State regardless of necessity or prudence.

Is it not plain that so far as the State has not seen fit to trammel its own action the course of action is left for those to

whom is committed the power of the State in the particular case.

The moment we get beyond the limit defining *power* and come to the region in which *right* should govern—the question is not judicial for that applies to power—but it has nothing to do with the wisdom or folly, the right or the wrong, if you can predicate these things of legal powers.

Probably there never will be an end of the controversy. There is no standard to appeal to. The practical argument of greatest efficiency is to ask, do you believe the nation would have consented to endow a court with this unlimited and undefined power to stop the action of government, if they had been asked to do so? Is it becoming in a judicial tribunal to arrogate such a power by mere implication? For myself I cannot see even an excuse.

The fact that all men are compelled to obey the legislature at the peril of legislation being illegal is a dreadful consequence of a written Constitution—so much so that the want of any provision for the case is *the blot* on the wisdom of the framers. But what is to be our fate if a standard that *may* or *may* not be applied at the caprice of such judge such as have been selected? Will the standard be the social compact, the principles called American institutions or a paternal government? Are the rules of socialism or anarchy more certain? And is not certainty in law the first of all requisites?

No one expects certainty in the ordinary sense of the word, it is impossible. The principles being admitted and the language selected, there remains and always must remain all the uncertainty that we all see and feel and lament. But if the meaning of a testator is a never-failing source of uncertainty when the problem is only what his language means, what a chaos it becomes if there is to be no language in which the intention is expressed nor any definition of the principles to be applied in ascertaining that intention?

This it seems to me is the canon by which constitutional law is to be ascertained if the written document is not the sole guide for a judiciary, and it is a consequence that would

warrant an amendment restricting the powers of the judiciary as to all such questions if the State is to remain free.

If this is a mistake will not some one come to the rescue and justify on a rational basis, the claim to authority to declare as the law of the land, that the legislative power of a State is restrained by rules not to be looked for in any written document, but which may be evolved out of the inner consciousness of the judiciary, and possibly out of that of a majority of one out of nine. And secondly that this power, if it exists, is conferred on the judiciary only and not on the mob.

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PARKLAND HILLS BLUE LICK WATER CO. v. HAWKINS.¹ COURT
OF APPEALS OF KENTUCKY.

The name "Blue Lick Water," having been notoriously used for more than a century to designate the water of certain springs known by that name since their first discovery, is a good trade-name, in the hands of lessees of said spring, as against the owners of an artesian well in another locality, who have given the name "Blue Lick" to the water of their well, with a view to deceive the public into a belief that it came from the Blue Lick Springs.

GEOGRAPHICAL NAMES AS TRADE-NAMES.

The terms "trade-mark" and "trade-name" are frequently used indiscriminately to denote the same thing; but in strict usage the trade-mark is the brand put upon the goods, including both the name and the sign usually joined therewith, while the trade-name is the designation given to the goods, without reference to the other signs used on the brand. In this correct sense the trade-name is only a part of the trade-mark, and the two terms cannot, with propriety, be used interchangeably. For example, in the principal case, the trade-name was "Blue Lick Water," while the trade-mark consisted of a figure of Daniel Boone, with the date of his discovery of the springs, the trade-name and the name of the proprietor, the trade-name thus forming but a comparatively small part of the trade-mark.

I. A trade-name must necessarily be more or less unique, in order to entitle its owner to its exclusive use. "Smith's"

¹ Reported in 26 S. W. Rep. 389.

Hair Tonic" may be manufactured by any man named Smith, and none of the family can lay claim to the exclusive use of that name to denote his hair tonic. But if he choose to call it "Smith's Excelsior Hair Tonic," he may prevent any other Smith from copying that title as a whole; and so if he call it "John Smith's Hair Tonic," as against Thomas, Henry, William, Peter, or any other Smith except another John. The reason of this is, that any man has a right to use his own name in his business, so long as he does not deceive others into the belief that that business is identical with someone's else, and therefore no one can prevent his so using it in good faith; but if he invents an arbitrary or fanciful name or combination of names not used before, he has a right to use it to the exclusion of others.

II. Applying these principles to the use of geographical names, it is plain that, as a general rule, the use of the name of a locality as a trade-name confers no proprietary right upon the user, as against others doing business or manufacturing in the same place, even though he be the first in the field. "When a name is used by a manufacturer in a purely geographical sense, as indicating that his goods are manufactured there, any one may also use it in that sense, provided he does not so use it as to induce the belief that his goods are the goods of manufacturers previously established there;" *Ld. Hannen, in Montgomery v. Thompson* [1891], *App. Cas.* 217. "No one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True, it may be that the use by a second producer in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his

goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done:" *Canal Co. v. Clark*, 13 Wall. 311; *Evans v. Von Laer*, 32 Fed. Rep. 153; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Candee, Swan & Co. v. Deere*, 54 Ill. 439; *Glendon Iron Co. v. Uhler*, 75 Pa. 467; *Siebert v. Abbott*, 61 Md. 276; S. C. 48 Am. Rep. 101; *Laughman's App.*, 24 W. N. C. 465; S. C., 18 Atl. Rep. 415; *Am. Brewing Co. v. St. L. Brewing Co.*, 47 Mo. App. 14.

III. This rule, however, is subject to several qualifications. Though, as we have seen, the mere fact that the use of the name by another may mislead the public into a belief that his product is the same as that of the first user of the name, is no reason for prohibiting such use, yet that use must be in good faith, not with *the intent to so mislead purchasers*. Any fraudulent use of the name will be enjoined: *Siebert v. Abbott*, 61 Md. 276; S. C., 48 Am. Rep. 101; *Evans v. Von Laer*, 32 Fed. Rep. 153; *Siebert v. Findlater*, 7 Ch. D. 801. Accordingly, when a geographical name has, by long usage, acquired a secondary meaning, as denoting a particular product, such as "Worcestershire Sauce," a use of that name to induce the belief that the article was the same, and not merely to denote the place of manufacture, will be enjoined: *Lea v. Wolff*, 1 Thomp., & C., 626; S. C., 46 How. Pr. 157; 15 Abb. Pr. N. S. 1, reversing on this point S. C., 13 Abb. Pr. N. S. 389.

A curious instance of mental perversion on this point is to be found in another "Worcestershire Sauce" case: *Lea v. Deakin*, 11 Biss. C. Ct. 23. There the court held that when a name has become generic in meaning as "Worcestershire" in this case, and denotes a special kind of product, it cannot be appropriated as a trade-mark. The confusion rises from the use of the word "generic." Words denoting a special quality of goods, which anyone may manufacture, such as "four-ply" collars, "lager" or "bock" beer, "rye" whisky, etc., cannot be appropriated by anyone. But the very essence of a trade-mark or trade-name is that it denotes something that no one else can manufacture, as in this case, the principal case, and others to be mentioned hereafter.

IV. The intent to deceive may be inferred, and in fact taken as an irrefutable presumption, from the fact that the goods of the second user of the name are not manufactured at the place in question, or do not come from it. It is the very nature of a lie to deceive. *M'Andrew v. Bassett*, 10 Jur. N. S. 492; *Braham v. Beachim*, 7 Ch. D. 848; *Blackwell v. Dibrell*, 3 Hughes C. Ct. 151; *Anheuser-Busch Brewing Assn. v. Piza*, 24 Fed. Rep. 149; *Southern White Lead Co. v. Cary*, 39 Fed. Rep. 492; *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Newman v. Alvord*, 51 N. Y. 189; aff. S. C., 49 Barb. (N. Y.) 588; *El. Modello Mfg. Co. v. Gato*, 25 Fla. 886; S. C., 7 So. Rep. 23; *Parkland Hills Blue Lick Waters Co. v. Hawkins*, the principal case (Ky.), 26 S. W. Rep. 389.

There is but one case in opposition to this current of authority: *N. Y. & R. Cement Co. v. Copley Cement Co.*, 44 Fed. Rep. 277; aff. 45 Fed. Rep. 212; in which the plaintiff, a manufacturer of "Rosendale" cement, at that place, sought to enjoin the use of the term "Rosendale" by the defendant, whose place of manufacture was elsewhere. The court refused the injunction, on the ground that such a doctrine would permit any actual manufacturer of or dealer in "Dresden" china or "Irish" linen, to bring suit against all those who falsely called their products or wares by such names; in the second place, that the wrong was against the public, rather than against the manufacturers; and in the third place, that if any private wrong was done, all manufacturers at Rosendale were injured alike, and the plaintiff could not support its case without showing an exclusive right to the name. But when there is a clear injury, and an equally clear remedy, the courts have no business with possible consequences (to say nothing of the fact that courts of deeper wisdom and sounder judgment have failed to perceive these direful bugaboos); there is a clear private wrong in deluding the public into a belief that one man's goods are those of another, and so lessening the sales of the latter; and the question of right, as between one who has a right, though partial, and one who has none, is not affected by the rights of third parties. On every ground, the ruling in the Rosendale case is wholly wrong.

V. It does not matter that the goods or products of the second user of the name are the same in quality as those of the first. If they do not in fact come from the same locality he has no right to represent them as such. Thus, when the plaintiff owned nearly all the coal lands in Radstock parish, and sold it herself as the product of the "Radstock Collieries;" and the defendants, who had previously been coal merchants in Radstock, under the title of the Radstock Coal Company, bought a colliery outside of that parish, which nevertheless produced the same grade of coal, known to the trade as Radstock coal, and began to sell it under the name of "Radstock Colliery Proprietors, &c.," they were enjoined from using that name until they should own a colliery in Radstock, or secure the right to handle coal mined in the parish: *Braham v. Beachim*, 7 Ch. D. 848. So, where coal from the Lochgelly collieries had been known for many years as "Lochgelly Coal," and was the only coal so known in the market, though a seam known as the Lochgelly splint seam extended under other estates as well, the lessees of the mineral rights of an adjoining estate were enjoined from advertising their coal as Lochgelly Splint Coal, though the name was true enough, and were ordered to advertise it only as Lumphinnans Splint Coal, Lochgelly seam (presumably to avoid any possible risk of deception): *Lochgelly Iron & Coal Co. v. Christie*, 6 Ct. of Session Cas. (4th Ser.) 482. This case goes farther than any other on the subject, but no one can deny that it did exact justice, with a more scrupulous regard than usual for the rights of the parties.

VI. Even when the goods are manufactured or produced at the place in question, if the name of the place is used fraudulently, or if the manufactory has been located with a view to obtaining the advantage of the name to the detriment of the other, the use of the name will be enjoined. In *Seixo v. Provezende*, 1 L. R. Ch. 192, the name of a district in Spain had long been used to denote the wines grown on one estate in that district; and it was ruled that the name could not be applied to wines from another estate of the same district, so as to mislead the purchasers. In *Wotherspoon v. Currie*,

5 L. R. H. L. 508, the plaintiff, who had originally carried on the manufacture of "Glenfield" starch at Glenfield, a little place of some sixty inhabitants, had removed his factory, retaining the name. The defendant had purchased a small lot at Glenfield, and carried on the manufacture of starch there, also using the name "Glenfield" to denote his starch. But, in view of the fact that the whole scheme was intended to induce people to believe that the defendant's starch was the plaintiff's, an injunction against the use of the name was held proper.

So, in *Thompson v. Montgomery*, 41 Ch. D. 35, the plaintiffs below and their predecessors had carried on a brewery in Stone (a town of Staffordshire of about six thousand inhabitants) since 1780, using the name "Stone Ales" to designate their product. The defendant, who had previously sold their product, put up a brewery at Stone, and used the word "Stone" in connection with liquor of his own manufacture, with a view, in the opinion of the trial judge, to lead the public to the belief that the ales he was then selling were those of the former firm. An injunction was accordingly granted, and affirmed on appeal. The case was then carried to the House of Lords, and there the decision was reaffirmed, though there was a doubt in the minds of some of the Lords as to the question of the use of the name "Stone:" *Montgomery v. Thompson* [1891], App. Cas. 217. This precise question has not yet risen in the United States; but it is to be hoped that when it does it will be decided in accordance with the just doctrine laid down above.

VII. There is another class of cases to which the foregoing reasoning applies with special force—where the goods to which the trade-name is attached are the products of only the one locality, and the plaintiff has the exclusive right to manufacture or deal there; or where the name of the locality is an arbitrary and fanciful one, as that of a mineral spring. In these cases there is every reason for holding that he has an exclusive right to the name of the locality as a trade-name. "A trade-mark may be a name adopted and used by a merchant or dealer, in order to designate the goods that he sells,

and distinguish them from those sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from the celebrity of his wares, or a reputation for superior skill, industry, or enterprise, in handling the articles put on the market. Any name may be so used that he may deem appropriate, as designating the true origin or ownership of the article to which it is affixed, though he may not appropriate a name indicative of the quality of his goods, which others may employ with equal truth for the same purpose. There is no conceivable reason why the name of a place may not be selected as a trade-mark, or a natural product of a spring be the subject of the protection afforded by it: "Parkland Hills Blue Lick Water Co. v. Hawkins, the principal case (Ky.), 26 S. W. Rep. 389. Accordingly the name Congress: Congress Spring Co. v. High Rock Spring Co., 45 N. Y. 291; aff. S. C., 10 Abb. Pr. N. S. (N. Y.) 348; Bethesda: Dunbar v. Glenn, 42 Wis. 118; and Blue Lick: Parkland Hills Blue Lick Water Co. v. Hawkins, *supra*, have been held valid trade-names, and protection granted against others who attempted to use them, to the injury of the owners of the springs. In these cases, as in the "Worcestershire Sauce" case; Lea v. Wolff, 1 Thomp. & C., (N. Y.) 626; S. C., 46 How. Pr. (N. Y.) 157; 15 Abb. Pr. N. S. 1. And the "Stone Ales" case: Thompson v. Montgomery, 41 Ch. D. 35; Montgomery v. Thompson [1891], App. Cas. 217; the use of the place name has become secondary, and denotes the product itself, rather than the place of its production.

VIII. But while the name of a place may not be used singly as a trade-name, to the exclusion of others doing business there, it may be so used in connection with other words, either the name of the dealer or manufacturer: Candee, Swan & Co. v. Deere, 54 Ill. 439; or an arbitrary word or combination of words, as "Maryland Club:" Cahn v. Gottschalk, 2 N. Y. Suppl. 13. And in the same way an arbitrary use of a geographical term, to denote an article that is not in reality, nor in the nature of things could be manufactured there and sold at the place of sale, will make it a valid trade-name, as

"Vienna" bread: *Fleishmann v. Schuckmann*, 62 How. (N. Y.) Pr. 92.

IX. The results of the preceding discussion may be thus summarized: 1. A geographical term cannot be used as a trade-name to the exclusion of others doing business in the same place, and using it in good faith to designate the place of manufacture of their goods or their place of business. 2. But it may be so used as against any one who attempts to make a fraudulent use of it to the injury of the first user, whether he be an outsider or be engaged in business at the place in question. 3. When the name of the place has become so associated with the product as to lose its local force and acquire a secondary meaning denoting the special product, it will be considered a valid trade-name. 4. When so associated with other words or combinations of words, as to acquire a fanciful or arbitrary meaning, it is a good trade-name. 5. When used arbitrarily, without any possible reference to locality, it is also a good trade-name.

R. D. S.

NOTES AND COMMENTS ON RECENT DECISIONS.

DECEDENTS' ESTATES.

Demonstrative or specific legacy.

Questions as to whether a legacy is demonstrative or specific are often very difficult to answer. An illustration of this will be found in the case *In re Pratt*, L. R. (1894) 1 Ch. 491. Testatrix bequeathed to her nephew "800 pounds invested in 2½ consols," she did not have at the date of the will any 2½ consols, but had 1800 pounds 2¼ consols in the name of her deceased husband and herself.

It was contended that the case was exactly covered by *Mytton v. Mytton*, L. R. 19 Eq. 30, where the words were "the sum of 3000 pounds invested in Indian security," and the legacy was held to be demonstrative. Justice NORTH would not say that this decision was wrong (although rendered by the unlucky Vice Chancellor MALINS) but preferred to find a distinction in the use of the word "sum" in *Mytton v. Mytton*. If, however, the distinction was too fine a one (as it appears to us) the learned judge had ample authority for holding the legacy specific: *McClellan v. Clark*, 50 L. T. (N. S.) 616; *Page v. Young*, L. R. 19 Eq. 501, and others to the same point. Upon the will itself, independent of the authorities, the legacy was clearly specific.

Trust—Gift by will in pursuance of promise.

We read with interest the decision in *Hofner's Estate*, 161 Pa. 331. Testatrix by last will left a legacy to a church, and died May 26, 1892, two days after the execution of the will. There was a prior will dated December 1, 1892, a codicil to which, executed April 12, 1888, contained an identical gift. It appeared in evidence that testatrix had received a legacy from her sister Elizabeth in 1888, who had intended to leave her property to the church, but changed her mind and left

her property to testatrix, receiving her promise that she would never use it but would dispose of it according to Elizabeth's wishes. The promise was made after the execution of the will.

The Supreme Court found the Orphans' Court of Philadelphia County in error in holding that, as the legacy was identical with that in the codicil, the legacy was not avoided by the Act of April 26, 1855, P. L. 332. The first and last will were entirely inconsistent.

The gift, however, was sustained on the ground that the promise of testatrix to her sister raised a trust in favor of the object, in favor of which the will would have been changed but for that promise. As Justice DEAN would put it upon the principle of the *Golden Rule*, and although there was no fraud on the part of testatrix, there was none the less a trust. Justice MITCHELL, in dissenting, vigorously remarks: "I do not understand that equity, even under the benign administration of the longest footed chancellor, undertakes to enforce moral obligations in the length and breadth of the Golden Rule, and it is important that we should keep its boundaries carefully marked. If it was to be enforced as an obligation, the church should be required to file its bill, prove the consideration, the contract or trust, and the failure to perform as in other cases."

The decision of the court appears to have been a good natured effort to save the gift to the church. But the theory is hardly sustained by the evidence. There is absolutely nothing to show that Elizabeth even intended to alter her will when the promise was made.

Orphans' Court—Religious use.

We are tempted to go back to Knight's Estate, 159 Pa. 500, and note the decided enlargement of the definition of a religious use as understood by the law of Pennsylvania. Testator left \$1000 to the Friendship Liberal League, organized under the General Incorporation Act of April 29, 1874, "for the purpose of uniting the persons so to be incorporated socially, for the improvement of their intellectual and moral condition by the dissemination of scientific truths by means of literature,

music, lecture and debate." Its meetings were held on Sunday and it was dependent on the voluntary gifts of members and sympathizers. One witness testified that the League was "opposed to all isms." Another, who had attended a Sunday lecture, said: "It was a lecture against the Christian religion. A discussion followed in the same spirit." A third testified that the object of the League was "the investigation of truth," and this was till the light thrown upon its purposes. It was held to be a charitable use within the meaning of the Act of April 26, 1855, § 11, P. L. 332, by the Orphans' Court of Philadelphia County, 2 Dist. Rep. 523, chiefly because its purpose as set forth in the charter was the dissemination of scientific truth to all who wished to avail themselves of its privileges. Hence, it was a charity in the sense that a public school is a charity: *Episcopal Academy v. Phila.*, 150 Pa. 565. The gift therefore failed, the will having been executed within one month of testator's death. The language of the Supreme Court in affirming the decree is not framed with the same caution as was exercised by the learned court below, but would seem to imply that this was a *religious* as well as a charitable gift.

"In its broadest sense religion comprehends all systems of belief in the existence of being superior to and capable of exercising an influence for good or *evil* upon the human race." This is a definition broad enough to cover the worship of his satanic majesty and, indeed, the court cites among its examples the worship of idols and the religion of the North American Indians.

We understand that the court considered itself placed in a dilemma since any other interpretation would have made § 11, of the Act of 1855, discriminate against Christianity. But the exceedingly broad language of the court in this instance may compel them in future cases calling for an application of the *cy pres* doctrine to give effect to gifts anything but religious.

We do not look for such a result, but believe that if such a case arises, the court will distinguish this case upon the same grounds as the Orphans' Court, and that the sound doctrine

in *Zeisweiss v. James*, 63 Pa. 465, where a gift to "The Infidel Society in Philadelphia," hereafter to be incorporated was held void, will not be abandoned.

If a league is to be regarded as "religious" simply because it airs its peculiar views upon the first day of the week, and has some vague moral or immoral purpose which represents its intentions, then surely there can be no use for the word religious in the Act of 1855, since its meaning is hopelessly indefinite.

W. H. L.

EQUITY.

Declaration of trust.

The endorsement of notes and mortgages to one "for the use of" another is sufficient to create a trust and does not pass the legal title to the beneficiary, even though the nature of the trust is not stated: *Collins v. Phillips et al.*, 59 N. W. Rep. (Iowa) 40.

Trustee—Statute of Limitations.

The rule that the statute of limitations does not begin to run in favor of a trustee until he has openly repudiated the trust, was recently invoked in the Appellate Court of New York in a suit against a self-constituted liquidating partner, but the court held that this rule applied only to cases of actual, express and subsisting trusts, and was therefore not applicable to the case of a liquidating partner, whose agency is not a direct trust. If any trust had been raised here by implication or construction from wrong-dealing, the statute began to run from the date of the wrong: *Gilmore v. Ham*, 36 N. E. Rep. 826.

He who comes into equity must do so with clean hands.

"No polluted hand shall touch the pure fountains of justice." The principle here embodied is the chief foundation stone of the relief afforded by courts of equity and is called into requisition more often, perhaps, than any other. The Supreme Court of Indiana had occasion to rely upon it recently in the case of *Brown v. First National Bank of Columbia*, reported in 37 N. E. Rep. 158. From the facts it appeared that a justice of the

peace (Brown) before whom an affidavit had been filed charging with larceny a person who had fled the jurisdiction, entered into an agreement with the plaintiff (the bank), that if he secured the fugitive's arrest and the return of the stolen property he should receive a percentage of the latter. He did succeed in arresting the thief and in securing the property, and this suit was brought to compel the bank to pay him the compensation agreed upon. The court decided that the agreement was void as against public policy regardless of the good faith of the parties thereto, and notwithstanding the fact that the affidavit was not copied into the justice's docket, but was in fact taken from his office, and that no warrant was issued by him upon it. "All agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein are void though there are no open charges of corruption."

The agreement thus being void, the bank was not estopped from setting up such a defence even though it had received the benefits of the transaction.

Whether equity will refuse or grant its aid in such cases seems to depend upon whether or not the *terms* of the agreement must be appealed to and relied upon: See *Gray v. Oxnard Bros.*, 59 Hun. 387, and the celebrated case of *Sharp v. Taylor*, 2 Phil. Ch. 801.

Following trust funds.

We are reminded of the well-known case of *Farmers' and Mechanics' Bank v. King*, 57 Pa. 202, by a late decision of the Supreme Court of South Dakota, *Kimmel v. Dickson*, reported in 58 N. W. Rep. 561.

Kimmel had given to a certain bank a sum of money for a purpose which was recited in the receipt it gave him in return, namely, that the bank should pay it over to a designated third person when he presented to it a proper deed, duly executed, conveying to the plaintiff a certain piece of land for which the latter had contracted. Subsequently, and before any part of this plan was carried out, the bank failed and a receiver (Dickson) was appointed. Kimmel now sought to

recover his money, and Dickson denied his right on the ground that the bank had given him credit for the sum as a deposit, and had mingled the money with its own. This, however, had been done without the plaintiff's knowledge, and the court was very clear that it did not change the character of the transaction. The money so deposited, said the court, was plainly a trust fund and did not become assets or pass to the receiver. Being a trust fund Kimmel was entitled to follow it into the receiver's hands. The court, therefore, directed the receiver to pay it over to him.

Fraud—Sufficiency of averments of in the bill.

Upon a demurrer to a bill in which the complainant (a creditor) based his right to recover upon the fraud of the defendant the Supreme Court of Alabama recently gave an opinion upon the sufficiency of allegations in a bill when charging fraud.

The bill alleged that the defendant had conveyed all his property to his minor children to defraud future creditors; that he withheld the deeds from record for nearly a year, concealing their existence from complainant till after the debt was created; that he remained in possession and held himself out to complainant as the owner of the property; that he had given a mortgage on it to one who knew of his failing condition; and finally that he had remained in possession consuming and disposing of the property and thereby defrauding the complainant. The court overruled the demurrer and laid down the rule broadly that general averments of facts from which unexplained a conclusion of fraud arises are sufficient; and stated that the test in such cases was whether the averments of matters essential to the right of recovery were sufficient to notify the defendant that the *bona fides* of the transaction was assailed and to put in issue its validity. *Williams v. Spragina*, 15 So. Rep. 247.

Practice and pleading—Multifariousness.

The rules of practice and pleading in equity are well settled, but occasionally attempts are made to break away from them. In the case of *Burnham v. Dillon*, reported in 59 N. W. Rep.

176, which went up the Supreme Court of Michigan, the point was raised for the first time on the appeal that the bill was multifarious. The court replied that the proper method of making this objection was on demurrer to the bill before the expense of reference and testimony were incurred; and inasmuch as after full hearing they could now do complete justice to all parties they felt free to disregard this objection.

R. P. BRADFORD.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to William Draper Lewis, Esq., 728 Drexel Building, Philadelphia, Pa.]

HAND-BOOK OF CRIMINAL LAW. By WM. L. CLARK, JR. St. Paul, Minn.: West Publishing Co., 1894.

A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By LEONARD JONES. In Two Volumes. Fifth Edition. Boston: Houghton, Mifflin & Co., 1894.

THE LAW RELATING TO REAL ESTATE BROKERS, as decided by the American Courts. By STEWART RAPALJE. New York: Baker, Voorhis & Co., 1893.

DIGEST OF INSURANCE CASES, for the year ending October 31, 1893. By JOHN FINCH. Indianapolis: The Rough Notes Co., 1893.

CASES ON CONSTITUTIONAL LAW, with Notes. Part II. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever, 1894.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by T. E. and E. E. BALLARD. Vol. II, 1893. Crawfordsville, Ind.: The Ballard Publishing Co., 1893.

A TREATISE ON THE LAW OF BUILDING AND BUILDINGS, especially referring to Building Contracts, Leases, Easements and Liens, containing also Various Forms Useful in Building Operations, a Glossary of Words and Terms commonly used by Builders and Artisans, and a Digest of the Leading Decisions on Building Contracts and Leases in the United States. By A. PARLETT LLOYD. Second Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY. By LEONARD A. JONES. Fourth Edition. Revised and enlarged. Boston and New York: Houghton, Mifflin & Co., 1894.

AMERICAN RAILROAD AND CORPORATION REPORTS, being a Collection of the Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal

Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago: E. B. Myers & Co., 1893.

THE BANKING QUESTION IN THE UNITED STATES, Report of the meeting held on January 12, 1893, under the auspices of the American Academy of Political and Social Science. Addresses by HORACE WHITE, MICHAEL D. HARTER, A. B. HEPBURN, J. H. WALKER, HENRY BACON and W. L. TRENHOLM. Philadelphia: American Academy of Political and Social Science, 1894.

THE BENCH AND BAR OF NEW HAMPSHIRE, including Biographical Notices of Deceased Judges of the Highest Courts and Lawyers of the Province and State, and a List of Names of those now living. By CARL H. BELL. Boston and New York: Houghton, Mifflin & Co., 1894.

THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE. By EDWIN E. BRYANT. Boston: Little, Brown & Co., 1894.

AN ESSAY ON THE LAW RELATING TO TELEGRAPH COMPANIES. By EDWARD BROOKS, JR., of the Philadelphia Bar. Lancaster: Wickerham Printing Co., 1893.

POCKET MANUAL OF RULES OF ORDER FOR DELIBERATIVE ASSEMBLIES. By Lieut.-Colonel HENRY M. ROBERT. Chicago: S. C. Griggs & Co., 1894.

THE LAW OF EXPERT TESTIMONY. By EVAN B. LEWIS. Philadelphia: Rees Welsh & Co., 1894.

A MANUAL OF THE STUDY OF DOCUMENTS TO ESTABLISH THE INDIVIDUAL CHARACTER OF HANDWRITING AND TO DETECT FRAUD AND PERJURY, including Several New Methods of Research. By PERSIFOR FRAZER. Illustrated. Philadelphia: J. B. Lippincott Company, 1894.

TREATIES AND TOPICS IN AMERICAN DIPLOMACY. By FREEMAN SNOW, Ph.D., LL.B., Harvard University. Boston: The Boston Book Company, 1894.

A TREATISE ON DISPUTED HANDWRITING AND THE DETERMINATION OF GENUINE FROM FORGED SIGNATURES, THE CHARACTER AND COMPOSITION OF INKS, ETC. By WILLIAM E. HAGAN, Expert in Handwriting. New York: Banks & Brothers, 1894.

BOOK REVIEWS.

REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, according to the Reformed American Procedure. By JOHN NORTON POMEROY, LL.D. Third edition by JOHN NORTON POMEROY, JR., A. M. Boston: Little, Brown & Co. 1894.

The earlier editions of this work have long since made a permanent place for it among the books which the practitioner must keep within easy reach. Under the name of "Pomeroy's Remedies," the work has been cited in many judicial opinions and in briefs innumerable. This abbreviated title (as was pointed out by the author in the preface to his second edition) is to some extent misleading—for it omits the important words "by the civil action" which have the effect of restricting the scope of the more general appellation and of giving definiteness and certainty to it. Accordingly, the editor of the edition before us has placed upon the cover the name "Pomeroy's Code Remedies" by way of a compromise between the two, thus seeking to combine the brevity of one title with the accuracy of the other.

In this edition, the second has been "brought down to date" by means of slight additions to the text and by important additions to the foot notes. The editor tells us in his preface that he has also ventured to revise to some extent the matter inserted in the second edition; so that the work, in its new form, presents to the reader what is undoubtedly the most complete and in all respects the best treatise upon Remedies by the Civil Action in existence.

To use such language as this of a work which deals with Procedure under our American Codes is to accord it a large measure of praise. Thoughtful and able writers have dealt with the subject, but, in the judgment of the reviewer, Mr. POMEROY surpasses them all in simplicity of arrangement, clearness of style and accuracy of statement. The subject is

full of difficulties, for the several Codes differ to some extent among themselves, and their provisions have in many instances met with unsympathetic treatment at the hands of judges whose common law training caused them to look with suspicion upon a system so different from that which it has supplanted. Indeed, it should be said here that the favorable comments in this review are directed to the work in hand and in particular to this edition of it; the writer finds it impossible fully to agree with Mr. POMEROY in his expressions of unreserved commendation of the Code and the Civil Action.

A careful examination has been made of the matter contained in brackets—the distinctive features of this edition—and it appears that in all cases the work has been done with care and judgment. The addition to the notes on "Actions Arising in Special Cases" and on "Counter Claim" are especially valuable. The typography, paper and general make-up of the book are excellent.

G. W. P.

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS IN THE UNITED STATES. By CHRISTOPHER G. TIEDEMAN. New York and Albany: Banks & Bros. 1894.

The rapid succession of Treatises on Municipal Corporations since the fourth edition of DILLON's work in 1890, is but one of the many indications of that rapidly approaching period when every one of the many phases of our municipal problems shall have been subjected to the close scrutiny of scientific analysis. It is only within the last decade that we have commenced to fully realize the influence which our courts have exercised in shaping our conception of the municipality, and in determining its form of government. When Judge DILLON's "Commentaries on the Law of Municipal Corporations" first appeared in 1872, this field of legal research was still uncultivated. Nevertheless, the work proved itself a masterpiece in its way; mirroring with remarkable accuracy the position occupied by our courts towards the cities of the Union. When this first edition appeared we

were still a country of small cities. During the twenty years which mark the interval between the first and the fourth, we have been rapidly developing into a people dependent upon the efficiency of our city governments for a mass of necessities and comforts. The more recent works treating of this subject show, with almost startling clearness, the lack of recognition, on the part of the courts, of this change in our social conditions, together with the changes in the problems of our municipalities, which this social revolution or evolution has engendered. One of the most valuable portions of DILLON'S work was the clear recognition of these changes, especially in the earlier portions of the first volume. Professor TIEDEMAN'S book lacks to a very great extent this most important element. His work loses, therefore, both in interest and value to one interested beyond purely legal aspects of these questions. It is true that the author in his preface distinctly states that he has endeavored to include everything material and exclude everything immaterial "to the clear comprehension of the general principles and rules of law bearing upon or involved in the subject." But, even regarded as a text book, intended exclusively for the legal mind, there can be no doubt that the careful consideration of the relation between judicial decisions, and the problems actually confronting our great cities—and we lay special emphasis on the problems of the *great cities*—constitutes one of the most important sections in any work on municipal corporations.

Mr. TIEDEMAN divides his work into nineteen chapters dealing with the whole range of municipal activity. The cases cited are exceedingly numerous, in fact, at times out of proportion to the importance of the problems involved. The three most important chapters are those which treat of the legislative control over municipal corporations, municipal securities, and municipal taxation and local assessments. In all three, considering the vastness of the problems involved, the author has given us an extremely succinct and able statement of the present condition of the law. When we stop to consider that in 1890 the total municipal indebtedness (exclusive of county and school district) in the United States was:

nearly \$725,000,000, whereas the total National debt amounted to not more than \$900,000,000, and the total State debt to less than \$229,000,000, the growing importance of this branch of the law is readily appreciated. When we reach our great cities the importance of the questions of local finance—taxation, assessments and indebtedness—so far outweighs all questions of State finance as to make the former the problem uppermost in the taxpayer. As regards the chapter on the legislative control over municipal corporations the author has not been quite so happy in his methods of treatment nor in the arrangement of cases.

One point, however, is brought out with great clearness, viz., the clear recognition of those functions which are purely local in their nature, and over which the municipality, as such, ought to have complete control. Although the traditions of our courts give but little encouragement to this principle, the trend of later decisions is unmistakably in its favor. The value of this chapter in the present work would have been greatly enhanced had the author considered more in detail the instructive history of the attitude of the courts towards municipal public works. Nothing brings out more clearly than this line of decisions the American theory of municipal government. The cases cited show that all the material was at hand, which makes the omission doubly regrettable.

The work, on the whole, will undoubtedly serve the purpose for which it is intended. That it will supplant or even offer anything beyond DILLON's "Commentary" is more than doubtful. We have still to await the work which shall treat, not only of the present condition of the law of municipal corporations, but also its relation to the complicated economic and political problems of finance and administration which are at present confronting our great cities.

L. S. ROWE.

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PROCEEDINGS OF THE NATIONAL CONFERENCE FOR GOOD CITY
GOVERNMENT, held at Philadelphia, January 25 and 26,

1894, together with a Bibliography of Municipal Government and Reform and a Brief Statement Concerning the Objects and Methods of Municipal Reform Organizations in the United States. Philadelphia: The Municipal League. 1894.

The proceedings of conferences do not, as a general rule, make interesting reading, but the conference, held on January 25th and 26th last, lends to the report an interest and value, which is quite exceptional. It was the first, but we feel confident, by no means, the last Conference on Good City Government, and marks the awakening of a new municipal spirit. It takes the average American citizen a long time to see that the conditions which confront him have changed, and that the political organization and administrative methods, which works well among a people who live in small towns, may be wholly inadequate to grapple with the very difficult problems, which concern a million or more of people gathered together in a comparatively small area.

Like all reports of conferences, the papers read at the meetings have been reprinted. Without making any invidious distinctions, the paper of LEO S. ROWE gives evidence of the most exhaustive knowledge of the question from its administrative side. What we mean by that is this, nearly all the other papers, of which those by CARL SCHURZ, CHARLES J. BONAPARTE and GEORGE GLUYAS MERCER are examples, display a minute and practical knowledge of the workings of political rings and the politics of our large cities, especial stress being, of course, laid upon the civil service evil, and, in the paper of CHARLES RICHARDSON on the "Introduction of National Issues into Local Elections." But Dr. ROWE's paper treats of the question from the side, where the average educated gentleman and reformer is as totally ignorant as the lowest ward heeler, viz.: what our cities should do for their inhabitants and how they should do it. The knowledge of political evils is common property to a large number of our citizens, probably to all of those who assembled at the conference in Philadelphia, but the knowledge of administrative methods and the results of those methods in foreign cities

must always be confined more or less to the specialist. And when the specialist speaks on his specialty, then knowledge which is new and valuable is given to the hearer. One of the most interesting parts of Dr. Rowe's paper is his destruction of the comforting theory, which we have heard many Americans of the educated classes express, that the reason foreign cities are better administered and give more to their inhabitants than the average American city, is because the capitals of Europe are governed, not by the people of the city, but by the central governments of the nation, which is run by the aristocratic, and, therefore, more or less the educated classes. But Dr. ROWE says, page 113: "Finally, we come to what is, in last analysis, the most important of the determining conditions in the municipal life of Berlin, viz., that the efficiency of the city administrations is due, primarily, neither to the Prussian Monarchy nor to the Prussian Bureaucracy. It was the will, the consciously-expressed will of the people of Berlin, that determined the character of their municipality. Judged from this standpoint Berlin is more democratic than either New York or Philadelphia."

Probably the part of the book, which has the most permanent value, is the subject index, which is, comparatively speaking, very complete. Nearly everything that has been written in English on the subject of improvement of cities from a political standpoint is referred to.

There is also an account of the different organizations, which have sprung into existence within the past few years, and whose object is the improvement of either city politics or municipal administration. We strongly recommend the work to any one desirous of making himself familiar with some of the details of the great political problem, which now confronts the American people; viz., the successful government of large municipalities.

W. D. L.

THE AMERICAN CORPORATION LEGAL MANUAL. Edited by CHARLES L. BORGMEYER, of the New Jersey Bar. Plainfield, N. J.: Honeymen & Co. 1894.

This book is a compilation of what are said to be the

"essential features of the statutory law regulating the formation, management and dissolution of general business corporations in America (North, Central and South), England, France, Germany, the Netherlands, Italy, Russia and Spain." It also contains a synopsis of the patent, trade-mark and copyright laws of the *world*. There is also appended to it a list of patent solicitors and of "selected and specially recommended corporation counsel." The compilations of the laws of the several States and countries included in the work are made, in most instances, by local attorneys whose names are prefixed to the matter prepared by them. The publication is intended to be an annual one.

Such a work as is thus indicated can scarcely be said to merit review in a law journal. It is entirely devoid of scientific value, can in no case have the weight of an authority, and is, moreover, disfigured, if not more or less discredited, by the element of advertising which enters into its composition. To the business man, who imprudently relies upon it for his guidance, it is, in common with all similar publications, likely to prove misleading and dangerous. Its contents, however, are such as, upon occasion, may prove serviceable to the lawyer who wishes to obtain a hasty outline of the existing legislation in reference to corporations, patents, etc., in the several States and countries covered by it and who cannot, at the moment, command the time or facilities for making a more thorough investigation. It may, also, serve as a useful index to the several codes and enactment which must ultimately be consulted.

The compilations contained in the book appear to have been made with reasonable care and attention to the more important provisions of the statutes which have been thus epitomized. If the publication should be continued from year to year, and is carefully and conscientiously revised, as changes occur in the laws, it should prove a useful hand-book for the purposes above indicated. It would, however, be much improved and rendered more worthy of professional confidence by the suppression of its advertising features.

W. R. F.

SAMUEL S. HOLLINGSWORTH.

It is with deep sorrow that the Editors of the **AMERICAN LAW REGISTER AND REVIEW** record the untimely death of Samuel S. Hollingsworth, Esq., a member of the Editorial Committee. The following notices, contributed by members of the Philadelphia Bar who had the best opportunity of becoming familiar with Mr. Hollingsworth in his capacity as teacher as well as practitioner, serve to show the loss which his death has occasioned.

Samuel S. Hollingsworth, one of the Editorial Committee of the **AMERICAN LAW REGISTER AND REVIEW**, one of the leaders of the Philadelphia Bar, and the Professor of the Law of Contracts, Corporations, and Pleading at Law, in the Law School of the University of Pennsylvania, died, after a brief illness, on Thursday, June 28, 1894.

A meeting of the Philadelphia Bar was held on July 2, 1894, in the United States Circuit Court Room. The Hon. James T. Mitchell presided, and Messrs. Henry N. Paul, Jr., and George Stuart Patterson were requested to act as secretaries. Addresses were delivered by C. Stuart Patterson, Esq., Richard C. McMurtrie, Esq., Hon. Samuel W. Pennypacker, Mayer Sulzberger, Esq., Richard C. Dale, Esq., John Cadwalader, Esq., David W. Sellers, Esq., and Charles Cooper Townsend, Esq. The following minute was unanimously adopted:

"The Philadelphia Bar mourns in the death of Samuel Shorey Hollingsworth, the loss of one, whose personal character and professional ability commanded the admiration and respect of all who knew him. He was a learned lawyer, a judicious adviser, and a skillful and persuasive advocate. As a teacher of law, he was patient and thorough, and he inspired those whom he taught with that enthusiasm for study, which always animated him. As a man he was courageous,

steadfast of purpose, prompt to recognize, and zealous to discharge the claims of friendship, and faithful to every call of duty. Dying in the maturity of his powers, and with the promise of yet greater distinction before him, he has left to his professional brethren, the memory and the example of his stainless life."

At a meeting of the Faculty and Fellows of the Law School of the University of Pennsylvania, the following minute was adopted:

The Faculty and Fellows of the Law School of the University of Pennsylvania, sorrowfully record by this minute their sense of the heavy loss which the University and the Law School have suffered in the untimely death of Professor Samuel S. Hollingsworth. His thorough knowledge of legal principles, accuracy of thought, and clearness of statement, made him an efficient and successful teacher. His courage, fidelity to right, and sound judgment were of signal service to the administration of the School. His colleagues mourn in his death, the loss of a learned professor, a valued associate, and a friend.

The Editors of the AMERICAN LAW REGISTER AND REVIEW cannot fail to add to these manifestations of sorrow, their own expression of grief for the loss which they have sustained in the death of Mr. Hollingsworth. His sound learning, his trained ability, and his clear judgment rendered him a valuable and efficient member of the Editorial Committee, his counsel and advice were always at the service of the Editors, and he was always ready to further the interests of the REVIEW. Nor can the Editors forget that they studied under Professor Hollingsworth in the Law School, and that they there came under that powerful and lasting influence which he brought to bear upon his students, and which bound each of those students to him as friend to friend.

C. S. P.

After an illness of about two weeks, Samuel Shorey Hollingsworth died of typhoid fever, on Thursday, June 28, 1894, at his residence at Gwynedd, Montgomery County, Pennsylvania.

Belonging to Philadelphia by ancestry, though not by birth, Mr. Hollingsworth's whole career as a law student and lawyer was identified with that city, and amply did he repay to its Bar the debt of his profession.

We add the following brief sketch of his life :

Mr. Hollingsworth was born in Cleveland, Ohio, on November 11, 1842, his parents being Jehu Hollingsworth, a native of Philadelphia, and Fanny E. Shorey, of Orleans County, New York. The family subsequently removed from Cleveland to Zanesville, Ohio, and his early education was conducted at the High School in the latter city. He had contemplated entering West Point, but concluded to complete his education at Yale College, where he entered in the Junior year and graduated in 1863, a member of a class which counted in its ranks a number of men who have since attained distinction : notably his former colleague and friend, the late George Biddle, of Philadelphia, William C. Whitney, ex-Secretary of the Navy, and Professor W. G. Sumner, of Yale.

Leaving college, Mr. Hollingsworth came to Philadelphia and began the study of law in the office of William Henry Rawle, Esq., whence he was admitted to the Bar in 1866. Shortly afterwards he was associated for several years with George W. Biddle, Esq., taking part in nearly all the important cases in which that gentleman was engaged during that period.

Upon leaving Mr. Biddle's office, he entered upon an active practice, but found time to take part in literary work, and, in company with Samuel W. Pennypacker, Esq. (now Judge of the Court of Common Pleas), and the late E. G. Platt, Esq., prepared the supplemental index to the English Common Law Reports.

At quite an early period he became interested in the law of patents and was led to take up that branch of practice, where his accurate and thorough general knowledge, so often lacking in the specialist, coupled with mechanical and scientific attainments of a high order, soon brought him to the foremost rank of patent lawyers.

So far, however, from restricting himself to this specialty, he

was constantly employed in general practice, and in 1889 was elected, by the Trustees of the University of Pennsylvania, to the Professorship of the law of Contracts and Corporations, and Pleading at Law. This chair he occupied until the time of his death.

In politics Mr. Hollingsworth was a strong Republican, but in 1881 he received an independent nomination for the Common Councils of Philadelphia, to which office he was elected from the Seventh Ward, after a close contest.

Conspicuous service on the Committees of Law, of Finance and of the Gas Works, and the general recognition of his ability, both by his colleagues and constituents, led to his renomination and election by the Republican party. After serving a portion of his second term, he removed to the country and consequently resigned his position.

In addition to membership in the committees above referred to, he was chairman of the committee which investigated the affairs of the Alms-house, and whose startling revelations led to radical and permanent changes in the management.

The very brief time permitted for the writing of this sketch has not sufficed to collate and set forth the numerous cases of importance in which Mr. Hollingsworth had an active hand and by which his powers became known to the Bar and Bench.

His professional character, as revealed by these labors, was marked most prominently by two traits—marvellous accuracy of knowledge, and an intuitive perception, immediate and unerring, of the crucial point of the case submitted to him.

Ardent and aggressive in debate, impatient of intellectual trickery or shallow thinking, relentless towards everything that had the least taint of unfairness, he so bore himself in the struggles of professional and political life that no antagonist could find ground to become an enemy, and many of his hardest battles won for him the lasting and warm regard of his opponents.

It is not often that an advocate of such force possesses in an equally high degree the judicial temperament, but the recognition of Mr. Hollingsworth's powers, by his brother lawyers, was not less in the latter direction than in the former. Few

men have been so often selected by agreement of counsel for referee or master in difficult cases ; fewer still in these positions, have succeeded in winning, to such an extent as he did, the confidence of litigants and counsel, or in obtaining a fuller acquiescence in judgments rendered.

Personally, his individuality was as strongly marked as was his professional character. Quick, often brusque, in manner, keenly alive to humor, simple in his tastes to a degree that would have seemed almost affected, but for the fact that affectation was a thing unknown to his frank and straightforward nature, he was a companion eagerly sought for by his fellows, and a friend whose heart knew only tenderness and truth.

F.

Russell's very able and interesting paper, which in the form of an address was delivered before the Yale Law School at the recent Commencement. Governor Russell traces very clearly the development of constitutions and presents a strong argument against the present tendency to incorporate into those expressions of fundamental principles a large number of laws or rules governing particular states of facts. These laws, as a matter of truth, represent the popular will or feeling with regard to such facts for the time only, and their presence in constitutions, although acceptable enough at the time of their insertion only tends to weaken at some future time that part of the system of government which should always be regarded as the most stable—the foundation.

until the plot has been completely consummated as that force cannot be employed to quell a practical insurrection during its continuance. If in the opinion of the President, under the advice of the Cabinet, the local authorities are unable to maintain the peace and take care of property within their jurisdiction, it becomes necessary for the citizen to look to the government to which he owes primary allegiance for the protection which somehow and somewhere is certainly guaranteed him.

The demand by the leaders of the labor disturbance, and by many of its sympathizers in various parts of the country, that Mr. Pullman, or representatives of the Pullman Company, shall submit the questions which have been made the excuse for the present unfortunate state of affairs to "arbitration," is a misuse and abuse of a legal term which is well calculated to confuse and unsettle the minds of superficially informed persons. *Arbitration* is the submission of a dispute between two parties to a third party agreed upon by the disputants. The arbitrator's status is simply that of a court and jury combined, and it is his duty to not only find upon the facts, but also to render a decision in accordance with the law.

The submission of the so-called dispute between Mr. Pullman and his employes would avail nothing; the legality of the former's position is too clear.

As Mr. McMurtrie said in his able address, entitled "Arbitration of the Demands of Labor," "So long as the so-called arbitrator can do no more than suggest, or advise, or counsel, there is nothing whatever of arbitration. It may be wise or foolish to follow the advice, but so long as there is no duty to obligation whatever resulting, we may lay this aside as a remedy, it is not arbitration."

The annotations have been reduced in number this month¹ in order to allow for the publication in whole of Governor

¹The number of annotations will be made up in the subsequent issues of the Magazine.

Russell's very able and interesting paper, which in the form of an address was delivered before the Yale Law School at the recent Commencement. Governor Russell traces very clearly the development of constitutions and presents a strong argument against the present tendency to incorporate into those expressions of fundamental principles a large number of laws or rules governing particular states of facts. These laws, as a matter of truth, represent the popular will or feeling with regard to such facts for the time only, and their presence in constitutions, although acceptable enough at the time of their insertion only tends to weaken at some future time that part of the system of government which should always be regarded as the most stable—the foundation.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

AUGUST, 1894.

THE PRENDERGAST CASE.

By H. M. BANNISTER, M. D.
Chicago, Illinois.

Medical expert testimony in cases of insanity has been the subject of severe animadversions by judges, both of trial courts and courts of appeal, at various times, and some rather rash condemnatory generalizations have been uttered. The utterances are rash because it is self-evident that there are competent insanity experts as well as incompetent ones, and any general indiscriminating condemnation only indicates that the one who indulges in it does not know or care to know how to distinguish the good from the bad, and is ready to make general deductions from this ignorance. It is unfortunate also that such utterances should be sent out from the Bench, as they tend to discredit the only available method of obtaining the truth and of securing justice in many cases. If insanity is a bar to crime or if it attenuates criminal responsibility in any degree, justice demands that it must be excluded before the accused can receive the full penalty for his offense. At times it may be difficult to ascertain fully and completely the mental state of the individual, and then strict justice requires that every effort be made to determine fairly and positively the full measure of his responsibility. When popular clamor is strongly against the accused, the need of a

calm scientific judgment is all the more evident. Lacking this, there is good reason to believe that public clamor which, in these cases, is by no means always right, and which when unchecked leads to lynch law, has in many instances unconsciously perverted witnesses, judges and juries, and led to outrageous miscarriages of justice.

The case of Patrick Eugene Joseph Prendergast, whose trial for the shooting of Carter H. Harrison, the mayor of Chicago, was finished in December last, is one that is instructive and suggestive in this connection. The prisoner was an imperfectly educated and physically and mentally defective Irish newspaper deliverer, twenty-six years of age, whose record is fairly stated in the summary of the evidence, embodied in the hypothetical question given to the experts for the defense. It may be stated here that the facts thus embodied were not disproven or even seriously contested, the facts of the killing were admitted, and the whole question before the jury rested on the condition of the accused as to sanity and responsibility at the time of the commission of the act. The case was clearly, therefore, one for expert testimony, and this was practically admitted by the prosecution, who engaged six physicians who had presumably had large experience in dealing with and treating the insane, and who might therefore be considered as experts, to examine the prisoner before the trial began. Of these six only one was found willing, after repeated examinations and conferences, to say on the witness stand that the accused was sane and responsible. The testimony of the other five was therefore dispensed with by the prosecution, but three of the six testified, when subpoenaed by the defense, in favor of the insanity and irresponsibility of the prisoner. Besides these, six other physicians testified for the defense, among them two ex-asylum officers and the jail physician. The following is the hypothetical question submitted to the experts for the defense :

"Assume that a young man, born of a family of which the grandfather was insane, presents evidence of hereditary defects in the skull, jaws, teeth and ears. Assume that during childhood the young man exhibited a liking for solitude, did not

take part in the sports of other children and had no friends among them.

"Assume, also, further that he was a dull, backward child at school; that about the period of puberty he became more distrustful and peculiar and in a measure antagonistic to his family. He began to indulge in promiscuous reading and began to advance opinions that were queer and strange in a boy brought up as he had been. He began to display a very exaggerated opinion of his own ability and resented criticism as persecution. Although professing to be a sincere Catholic he began to advance peculiar doctrines about prayer which he attempted to dictate to Christian Brothers by whom he had been educated. These views were so peculiar in a professing Catholic that they impressed the Christian Brother as insane delusions, that he also advanced such extravagant ideas about single tax matters, being an imperative necessity in the education of children; that he threatened his previous teachers whom, as pious Catholics, he claimed to reverence; that he threatened them with dire consequences if they refused to teach this political philosophy to young children.

"Assume at this time he was exceedingly restless in manner, couldn't sit still for a moment on a chair, and talked in a disconnected fashion. At this time he was very conceited and pompous and wrote incoherent letters. His manners and actions were such that he impressed the Christian Brothers by whom he had been educated, as a dangerous lunatic. Although professedly a pious Catholic he behaved during Mass and church services in such a peculiar manner as to impress a member of the choir that he was insane. During his visit to the Church of St. Columbkil he struck a peculiar attitude, persisting in enforcing himself in the choir reserved for the singers and organist; and during very solemn services he would enter the church with his hat on and assume different attitudes during solemn service which were inconsistent with his training, his birth, and education.

"Assume that in his discussions in the society connected with the church, he displayed such peculiar manners and action, that a member of the society who at first looked on him as a very

intelligent chap regarded him as a lunatic; that although a professed student and exponent of the doctrine of Henry George, he was unable to make other than illogical and disconnected speeches; that he resisted criticism by the members of the single tax club as an insult and complained of their treatment of him. That his action in the Single Tax Club was such as impressed several members of the club as those of a lunatic, despite the fact that he claimed to hold the same political philosophy they did.

"Assume that he labored under intense nervousness, stuttered, stammered, and would no sooner get started than he would talk of closing. He insisted on talking when not recognized by the president and denounced him as an atheist for bothering him. That he quoted Scripture in a discussion on municipal corruption which had no reference to the subject. That at this time he complained of persecution by his family because of his advocacy of the single tax idea; the persecution in reality being but a friendly remonstrance against a young man in poor circumstances trying to reform the world.

"Assume his manner and discussion at the club was different from most members. He desired to speak but never availed himself of the opportunity when it was in order. That on one occasion he entered the Secular Union, an organization of anti-church people, throwing his finger at the audience, after a discussion antagonistic to churches, he said, 'If you men persist in talking that way against the church we Christians will kill you.' His manner and actions were such as to impress a member of the union that he was a dangerous lunatic.

"Assume that although treated friendly by all the members, on a later occasion he resented any attempt at courtesy with a very savage look and action. That he was continually writing to prominent people, the world over, incoherent heterogeneous mixtures of religion, economy, and politics, generally without reference to anything. That although a pious Catholic, he wrote irreverent letters upon matters of church discipline to prelates of the church, so offensive in character as to arouse the indignation of his pious Catholic relatives.

"Assume that despite the fact that he was a man of very defective education and was regarded by Catholic clergymen as a lunatic and a man of deficient intellect, he insisted that he was so powerful in the church as to secure by a letter to the Pope the re-instatement of Dr. McGlynn.

"Assume that in November, 1891, he entered a debating club, of which he was a member, moved around the room in a manner to cause laughter by the members. The subject under discussion was the 'President of the United States.' The members began laughing. That, although not chairman, he rapped them to order, he then began to address the members on the subject of single tax, and then drifted to track elevation and city council, whom he denounced as robbers and thieves. And finally, although a pious Catholic, he referred to the intoleration of the Bishop and Pope.

"Assume that in the spring or summer of 1892, he visited a former instructor of the Catholic Academy, with whom he had a discussion on religion and single tax matter in such a disconnected way that the brother believed him to be insane.

"Assume also in the spring of 1893 he called on the same brother and seemed to be suffering very much from some mental trouble. He could not keep his position for a minute sitting on his chair, sometime he would allow himself to slide down till the back of his head rested on the chair. He would get up and pull his clothes down and talk in a very disconnected way, so that the brother regarded him as seriously demented, and called another brother of the same academy to the room. As the brother entered, the man under consideration stopped and looked at the new comer with a very wild stare, then stood up by his chair, walked around behind it. He had a very pompous air and talked in such a disconnected and irrelevant manner that the second brother regarded him as insane and dangerous.

"Assume that at this time he was just able to support himself in a very meagre fashion by carrying newspapers. He claims to have elected a Mayor of Chicago, whose popularity was notoriously great, and he further claims this Mayor, a man of university education, who was a shrewd politician, well

acquainted with every phase of Chicago politics, promised him a reward for his services, the position of Corporation Counsel, a position which could only be filled by a lawyer of admitted legal abilities.

"Assume further that the Mayor appointed to this position a member of the leading firm of Chicago lawyers, but despite this fact the man in question so persisted in his belief that he was to be the Corporation Counsel, that he called upon the appointee and introduced himself as his successor, and that thereupon the Corporation Counsel introduced himself to the other attachés of the office as his successor.

"Assume further that he was totally destitute of the needed legal knowledge, of lawyers' license, and very imperfectly educated.

"Assume furthermore that at this time he suddenly arose in the middle of the night from bed, wrapped the bed clothes around him, took a lamp in his hand and wandered around the kitchen table in the kitchen of the house in which he was boarding, in such a manner as to disturb the sleepers in the same room.

"Assume furthermore that he came back to his home at 3 o'clock in the morning during the latter part of July, ragged and shoeless, and did not know how he got in that condition, that he had been up in Wisconsin in a field praying for the general good of humanity; and that he was unable to tell how he got to Wisconsin; that for sometime thereafter he slept in the basement of a house in a very uncomfortable position on boards on top of a worn-out sofa; said basement was used as a storage place for coal and wood and infested with rats; that he slept there despite the remonstrance of his mother and brother.

"Assume that at this time he wrote a postal card to the Corporation Counsel; and that he could find and was to find means to elevate the railroad tracks better than the incumbent, and that the incumbent should resign and give him a chance; and that furthermore he was the only known man not a lawyer who applied for that position.

"Assume that on the twenty-seventh of August he was seen

Skidmore *v.* Bricker, 77 Ill. 164; Fadner *v.* Filer, 27 Ill. App. 506; Smith *v.* Zent, 59 Ind. 362; McCarthy *v.* Kitchen, 59 Ind. 500; Lytton *v.* Baird, 95 Ind. 349; Flora *v.* Russell (Ind.), the principal case, 37 N. E. Rep. 593; Mesher *v.* Iddings, 72 Iowa, 553; Hall *v.* Kehoe, 8 N. Y. Suppl. 176; Ramsey *v.* Arrott, 64 Tex. 320; Glasgow *v.* Owen, 69 Tex. 167; S. C., 6 S. W. Rep. 527; Shannon *v.* Jones, 76 Tex. 141; S. C., 13 S. W. Rep. 477. Accordingly, the conduct of the plaintiff must be free from any bad faith. In the first place, he must have given to the attorney, as the basis for his advice, a full and fair statement of the facts of the case, or he will still be liable: Guthbert *v.* Galloway, 35 Fed. Rep. 466; Blunt *v.* Little, 3 Mason, 102; Bliss *v.* Wyman, 7 Cal. 257; Potter *v.* Seale, 8 Cal. 217; Aldridge *v.* Churchill, 28 Ind. 62; Scotten *v.* Longfellow, 40 Ind. 23; Paddock *v.* Watts, 116 Ind. 146; S. C., 18 N. E. Rep. 518; Logan *v.* Maytag, 57 Iowa, 107; Mesher *v.* Iddings, 72 Iowa, 553; Schippel *v.* Norton, 38 Kans. 567; Cointement *v.* Cropper, 41 La. An. 303; S. C., 6 So. Rep. 127; Weil *v.* Israel, 42 La. An. 955; S. C., 8 So. Rep. 826; Wells *v.* Noyes, 12 Pick. 324; Donnelly *v.* Daggett, 145 Mass. 314; Stevens *v.* Fassett, 27 Me. 266; Huntington *v.* Gault, 81 Mich. 144; S. C., 45 N. W. Rep. 970; Baldwin *v.* Weed, 17 Wend. 224; Davenport *v.* Lynch, 6 Jones N. C. L. 545; Ash *v.* Marlow, 20 Ohio, 119; Walter *v.* Sample, 25 Pa. 275; Fisher *v.* Forrester, 33 Pa. 501; Emerson *v.* Cochran, 111 Pa. 619; Leahey *v.* March, 155 Pa. 458; S. C., 32 W. N. C. 292; 26 Atl. Rep. 701; Hall *v.* Hawkins, 5 Humph. (Tenn.) 357; Kendrick *v.* Cypert, 10 Humph. (Tenn.) 291; Forbes *v.* Hagman, 75 Va. 168; Sherburn *v.* Rodman, 51 Wis. 474; Palmer *v.* Broder, 78 Wis. 483; S. C., 47 N. W. Rep. 744. It is therefore not enough to merely prove the consultation with the attorney; the facts laid before him must also be proved: Aldridge *v.* Churchill, 28 Ind. 62; Porter *v.* Knight, 63 Iowa, 365; Blunt *v.* Little, 3 Mason, 102.

A suppression of material facts will render the defendant liable. "Any evasion or concealment by a prosecutor in his statement of case to his counsel, or any failure on his part to

"Assume that when he reached the police station and confronted the officer there, that he stated to the officer that he killed the Mayor because he had betrayed him; that he would talk no further about the circumstances of the killing until he had seen his attorney. Would you say, in considering all the facts and circumstances heretofore detailed, that the person referred to as having done the killing referred to was sane or insane?"

As the best statement of the facts indicating sanity and rebutting the evidence on which the hypothetical case of the defence was based, the above is certainly not a very strong showing, and this was admitted, as will be seen, by most of the medical witnesses for the State.

The first medical witness for the State was Dr. J. C. Spray, ex-Superintendent of the Cook County Asylum for the Insane, and the only one of the six experts first employed who was available to testify for the prosecution. The following is extracted from the record of his testimony:

"Q. Can you possibly remember the question that was put by the defense to the doctors upon the stand—the hypothetical question? A. Yes, I heard it read. Q. I want to ask you whether or not, taking that hypothetical case and associating with it your own knowledge of the man, what would your answer be? A. Well, taking that question into consideration, with my own knowledge and observation of the individual, I could not pronounce him insane. You can take some of the assumptions of that hypothetical question and you would be compelled to say that the party, if it had represented itself in any individual, he would be insane."

Considering the fact that all the assumptions of the said hypothetical question were merely statements of what was proven by undisputed evidence the above admission is important and the rather irregular combination of the answer to a hypothetical question with one's personal opinion from observation was required to satisfy the wishes of the counsel for the prosecution. Dr. Spray's personal judgment was at fault in this case, and it is to be hoped that he is not at the present time so ready to testify to the sanity of Prendergast.

There were some other points in Dr. Spray's testimony that might be noted, but as he was not the most decided medical witness for the State and space is limited, they may be passed. The second physician called was Dr. T. J. Bluthardt, an ex-county physician, who testified that he had seen Prendergast four or five times in the jail, and had talked with him on various subjects. He said: "I have given the man a very careful examination and made his case a very particular study, and have come to the conclusion that I have not found any trace of insanity in that person. He has got fixed ideas on certain points, he has got ideas that coincide with the views of everybody, but he has got logic and reason for everything he says, everything he disputes, and everything he discusses."

"Q. Was he not coherent in his talk to you? A. Very coherent in every respect. Q. Did you say anything to him about the killing itself? A. I did. Q. What did he say on that subject? A. The only thing that he said there that looks to me like a fixed idea—that there is no jury that can find him guilty of murder because he killed Carter Harrison, because he ought to have been killed. I asked him what defense are you going to make—if you are not going to be declared insane; what defense are you going to make if you are not defended on insanity, and he said 'on justification.' Q. Now then do you regard that as evidence of insanity? A. I do not. Q. Why? A. Because it is a fixed idea of a great many people that are politically involved in questions that they either do not understand or are fanatics in. Q. Do you regard him as a fanatic? A. I regard him as a fanatic in religion and also in politics. Q. Do you believe Doctor, from what you know of the accused, that he would have committed the crime if he believed that certain punishment would follow from its commission? A. I do not know how to answer that. He claims that he killed Mr. Harrison because he had to remove him for cause; Harrison was in the way of his public and political welfare. Q. I will ask you this: At the time he fired the shot that killed Mr. Harrison, do you believe that at that time he knew the difference between right and wrong and had the power of choosing between right and

wrong? A. Certainly he did, he knew exactly what he was doing."

Dr. Bluthardt in his direct examination also stated that paranoia was a term devised to cover a condition that had previously no English name, and was only known by its German designation of *allgemeine Verrecktheit*, a statement that does not do much credit to his psychiatric knowledge.

The next witness was Dr. H. M. Lyman, who it seems testified only as an expert. It will be seen from the following extracts that in this case involving life or death he seems to endorse the doctrine of the complete and absolute responsibility of some of the insane, an opinion, which, to do him justice, it must be said he has not always consistently held.

"Q. Now does the degree of responsibility in paranoia vary? A. Yes, I should think it would be very variable, as variable as the individual cases. Q. Does the word paranoia convey the idea of irresponsibility? A. Not necessarily. Q. What about fear of punishment in the paranoiac, what effect does that have on them? A. That would depend upon the intensity and extent of the disease. Some would be afraid of punishment; some would have no fear of it whatever, and would be utterly reckless. Q. In the first instance, wouldn't it be an evidence of a slight attack? A. Yes, it would show that there was a great deal of reasoning power still remaining. Q. In order to deprive a person of responsibility must he not be acting under an irresponsible impulse or delusion? A. Yes, sir. Mr. WADE: Isn't the question of responsibility one for the jury to answer? THE COURT: Perhaps we enlarge somewhat on the term responsibility. Mr. TODD: Substitute for responsibility, the power to discriminate between right and wrong, the power of choosing or not to do an act? A. It would be necessary to deprive him of responsibility, he must have a loss of power to distinguish between right and wrong. To choose between right and wrong actions. Q. Isn't paranoia a disease of the brain, manifesting itself by delusions and hallucinations? A. Yes, it is a disease or defect of the brain."

The hypothetical question of the State was then given to

Dr. Lyman, and in reply he said, "I should say he was sane."

Cross-examination by Mr. Wade brought out the admission that every act stated in the hypothetical case of the prosecution might have been performed by an insane man, and that a man under the influence of delusions might be insane and irresponsible and yet appear quite sane on many points.

Dr. Lyman was followed on the stand by Dr. John A. Benson, two years Superintendent of the Cook County Asylum. His testimony was very lengthy, and he was very decided in his opinions as to the insanity of the accused. Nothing in fact seemed capable of changing them, he maintained that an insane man could not "perform the actions as outlined to me in the hypothetical question and be, in my opinion, mentally irresponsible." In this he stood alone among the medical witnesses for the prosecution, all but two of whom were asked the question whether all the statements contained in the State's hypothetical case were not compatible with insanity. One, as will be seen, rather evaded the question, the others with the exception of Dr. Benson, unhesitatingly admitted that such was the fact. The two of whom the question was not asked, Drs. Spray and Bluthardt would undoubtedly have made the same reply.

To show still further the opinion of Dr. Benson, when the hypothetical case of the defense was given him, he answered that, assuming everything in it as true, he saw no reason to consider the individual anything but sane.

Dr. Andrew J. Baxter was the next witness, he considered that the hypothetical case of the State indicated sanity, but in the cross-examination admitted that the acts narrated might have been done by an insane individual. He also admitted a limited experience with insanity. The following is extracted from the record of his cross-examination:

"Q. Now I understand you to say in answer to Mr. Trude that you thought the man was partially insane? A. Well now that requires a little explanation if you will permit me. I have got some views in regard to this man myself. My belief in regard to this man Prendergast is this: That he is weak-minded; that he is eccentric; that he is vain and pomp-

ous and has a great conceit of his own importance and so on, but while he is eccentric in his manner, morose in his disposition, cross in his temper, morose and cross and so on, at the same time the man is perfectly capable of telling what he is doing and knowing between right and wrong. That is my position in regard to Prendergast. . . . Q. Well, do you think that this man's brain is, to a certain extent, diseased? A. O, you can have that structural change. Q. What do you mean by structural change? A. Anything that is brought around by the development of inflammation, a disease. Q. Well, don't you think that this boy's mind is diseased to a certain extent? A. No, sir; I do not. Q. Don't you think it is abnormal? A. I told you he is a crank. Q. He is what you term a crank, Doctor? A. Yes, sir."

Dr. J. K. Egbert, ex-Assistant County Physician, was the next witness. He testified that, in his judgment, the prisoner was sane. On cross-examination he admitted that all he knew about the prisoner was learned in the court room, that the actions narrated in the hypothetical case of the State might be all performed by an insane man, and that there was a certain incongruity in an illiterate newsboy demanding the position of Corporation Counsel.

Dr. N. S. Davis was the next witness called for the State. He had interviewed Prendergast in the jail and considered him sane. The hypothetical case of the State indicated sanity in his opinion. When asked in the cross-examination whether the acts there narrated could not have been performed by an insane man, he replied, "Well, to say what is possible is to assume more than human beings can do. They do not know what is possible. It is not at all reasonable to suppose they were insane."

In view of the fact that the hypothetical question of the defense was not asked Dr. Davis, one statement of his is noteworthy. He said it was a poor time to go and question the accused after the crime was committed; the mental condition must be determined mainly, if not entirely, from his condition and conduct prior to the act. There is no reason to suppose Dr. Davis had any knowledge whatever of the prisoner, except

what he learned during the trial, in fact it was not claimed that he had, and yet he seemed to have made up his mind very positively notwithstanding the undisputed record of the insane acts of the prisoner.

Dr. Leonard St. John, a surgeon, was next called. The following is taken from his testimony:

"Q. Will you please give your views on paranoia? A. Paranoia is quite a new term. It has been brought forward by some authorities to define a species of mental disease. Authorities differ as regards the essentials necessary for a paranoiac, so much so that I find it covers every degree of mental condition from a simple case of hysteria to a case of acute mania. They are all covered by the generic term paranoia. The authority who has quoted paranoia most extensively is one I have heard mentioned here to-day; that is Spitzka, whose definition is probably more clear. Do you wish me to give it? Q. Yes, sir. A. It is more clear than any of the other authorities. He defines it as a crank, a cranky state of insanity. Q. You heard defined here by somebody a quotation by Spitzka. You said something about the next page. A. That was in reference to the configuration of the skull and face if I remember right. Q. Can you quote from the book from memory? A. It was quoted from the book that such an individual would have a deformed brain; that he would be sexually perverted, and numerous other traits, and I think the witness was asked whether that would indicate insanity, such a condition of head. Such a head indicates an idiot, an idiot only, and you will find in Spitzka, page 88 or 86, where Spitzka qualifies it and says that they are idiots only and that those who are insane and not idiots, there is nothing in the configuration of the skull which would indicate anything at all according to Spitzka. . . . Q. What do you say with reference to that idea of his of being Corporation Counsel, under the circumstances? A. Simply that he had a good opinion of himself and his abilities, and wished to be Corporation Counsel. Q. Is there any evidence of delusion in that? A. No delusion; desire doesn't make a delusion." . . . Mr. Trudes' hypothetical question for the State was pro-

pounded to the witness, who answered "I would consider him sane.

In the cross-examination by Mr. Wade, the witness said that the fear shown by the accused when in the jail at the time of the Mayor's funeral, was an indication of a sane mind. When pressed as to whether insane persons might not feel fear, he said yes, but that it was a "sane element of insanity." This he explained as the retention of a natural instinct in the insane mind. He admitted also that all the acts stated in the State's hypothetical case might be done by an insane person.

Dr. St. John is not an alienist, but this cannot account for all the errors in his testimony. Paranoia, as understood by specialists in insanity is not quite the indefinite thing he makes it, and if his reading had been to any extent accurate, he could not have believed his own statement. Spitzka does not say that only idiots have cranial deformities, in fact he is badly misrepresented in this testimony. Fear, as a "sane element of insanity," is a novel idea; as a purely animal emotion, its manifestation is one of the most frequent phenomena of mental alienation, in which the higher inhibitions that restrain it are suppressed or weakened. The senior counsel for the prosecution, nevertheless, made the exhibition of fear on the part of the accused one of the strongest of his points to prove his sanity and apparently carried the jury with him, thus making an evidence of sanity out of one of the most characteristic symptoms of a deranged mind. That he could have gotten a physician who claimed to know anything about insanity to support him in this, shows how fictitious such claim must be, and is remarkable to say the least.

The last two medical witnesses for the State need not take much of our space. One was a homeopathic practitioner, who had made up his opinion from a ten or fifteen minutes interview with the prisoner in the jail and observation of him in the court room. The other was a general practitioner whose experience with insanity was not extensive, and who admitted that certain things in the accused seemed peculiar and showed indications of an unbalanced mind. Both admitted the compatibility of the actions in the State's hypothetical case

with insanity, and neither could be called very strong witnesses for the prosecution.

I have not reviewed the medical testimony for the defense, as it did not present the peculiarities of that for the prosecution. On the one hand we have the facts that out of six alienists, selected by the counsel for the State, on account of their qualifications as insanity experts, and who repeatedly examined the accused some days or weeks prior to the trial, only one could be utilized against him, and this one, not by any means superior to his confreres, while testifying for the prosecution, admitted the defective organization of the prisoner, and that certain facts of the testimony embodied in the hypothetical case of the defense, must necessarily indicate insanity. Three of these experts, Drs. Brown, Church and Dewey, were subpoenaed by and testified for the defense. Besides these several other medical men of more or less experience in the case of the insane, including in their number Dr. J. G. Kiernan, a well-known authority on insanity, and Dr. Wahl, the jail physician, gave unequivocal testimony on the same side.

On the other hand we have the fact that apparently only two of the medical witnesses for the State had examined the prisoner before the trial, one of them, Dr. Spray, their most competent witness as regards experience with insane cases, made, as has been seen, admissions that ought to have materially affected the value of his testimony for the prosecution. The other one, Dr. Baxter, also made admissions, not only that the prisoner was a crank, an abnormal individual, but also that he personally did not know very much about insanity. The other medical witnesses were apparently picked up at random, their essential qualification being their opinion that the accused was sane. Only two, or at most three, of the State's medical witnesses could claim much experience with insanity; one of these, Dr. Spray, has been already mentioned, the others were Dr. Benson, two years Superintendent of the Cook County Asylum, a fact which, by itself, does not prove competency as an expert, and Dr. Bluthardt, who, as a former County Physician, had had experience with insane cases in the jail and in their trials before the county court.

It would seem much like threshing over old straw to dwell here on the evils of partisan expert testimony; it is the opprobrium of English and American medical jurisprudence and has formed the text for articles almost without number, for the last forty or fifty years. The evils exist, however, and we have here examples of them. They will continue to exist as long as courts have no standard of qualifications for an expert; as long as anyone with a medical handle to his name can be put forward and be equally acceptable to the court and influential with the jury, whether he knows the rudiments of the subject on which he poses as an expert or not.

This case, however, illustrates a more hopeful phase of the subject; it shows that true experts can be depended upon to give an honest opinion. Out of six selected by the State for their well-known reputation and standing in the profession, who made thorough examinations of the prisoner, it dared only put one on the stand, and his testimony contained admissions that ought to have made it quite as valuable for the defense as for the prosecution. It also illustrates the need of real expert testimony in cases like this where popular prejudice runs high, when an especially prominent and popular individual has been the victim of a homicide. In such a case especially is the truth of Dr. Beard's statement that the only really valuable testimony is expert testimony, made evident. When the whole case revolves upon the question of the sanity or insanity of the accused, a calm scientific opinion is especially needed, and the worth of a witness depends upon his special knowledge of the subject in hand. And as Dr. Beard says insanity is a subject in which the emotions are especially called upon and real experts are very rare.

Another question that is suggested by this trial is that of the right of the prosecution to suppress testimony that may be favorable for the defense. When the counsel for the defense suspected that some of the experts' opinions might not be favorable to the other side, they subpoenaed four of the experts who had been engaged to examine the prisoner before the trial. These gentlemen had received no retainers from the prosecution; one of them was excused, and three appeared

on the witness stand in obedience to the subpoena. The fact that they had been first called by the prosecution to examine the prisoner, was sought to be presented to the jury, but this was successfully resisted. Of the two of the six experts not subpoenaed by the defense, one, Dr. Spray, appeared for the prosecution; the other, Dr. Clevenger, did not appear on the witness stand at all, his testimony being thus practically suppressed.

Theoretically, in capital cases, the accused is presumed to have all reasonable chances for his life, it is not according to the spirit of the law to deprive him of the benefit of any facts that may indicate or tend to indicate his innocence or his irresponsibility. The duty of the prosecution is supposed to be the simple furtherance of justice for the protection of society, and conviction and subsequent execution in a capital case, secured by the suppression of evidence, either directly or by legal technicalities, can only be properly characterized as a judicial murder.

Fortunately, matters have not gone so far in the case of Prendergast. Though convicted on the testimony of which I have given samples, sentenced to death, his sentence affirmed by the higher court and executive clemency denied, he still lives and is awaiting his trial for insanity.

Since the above was written, the trial for insanity has occurred, and the jury found him sane. The following from the judge's instructions will explain, to a large extent, the result.

After ruling in the trial that the former trial had settled the question of the prisoner's sanity at the time of the killing, and that only facts evidencing the occurrence of insanity since his sentence were admissible, the judge instructed the jury as follows:

"In this proceeding the question simply is, does he understand and appreciate the fact that he has been tried and found guilty of murder? Does he understand the nature of this proceeding?

"Is he so far sane as to be capable of making preparation for death? Or, in a word, is he so far sane that it would not be contrary to humanity to execute him. This is the test and whether he be sane or insane in any other sense it does not concern us to inquire.

"If you believe from the evidence that the prisoner has insane delusions in respect to some subjects, yet if you are further satisfied from the evidence that none of these delusions render him unconscious of his present condition or unfit him for making preparation for death, then you are instructed that such delusions do not constitute such insanity or lunacy as to afford a reason for staying the execution of the sentence of the court."

In other words, if a lunatic has sense enough to know he is ordered to be hanged, he must be hanged. This would leave only absolute demented and idiots to get the benefit of the plea of insanity. The special humanity, too, of making lunatics suffer punishment in proportion as they are capable of being distressed by it is peculiar to say the least.

If these instructions including that, the former verdict made the prisoner sane, are good law, they are certainly indefensible in any moral or medical point of view.

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FLETCHER v. PRATHER.¹ SUPREME COURT OF CALIFORNIA—

Under Cal. Pol. Code, § 325, which provides that a statute amended in part is not repealed, but the unchanged portions are considered as having been the law from the date of the enactment, and the amended portion as dating from the amendment, the amendment of a statute does not have the effect of repealing it, so that a subsequent amendment of the original statute, without referring to the first amendment, is inoperative and void.

THE EFFECT OF AN AMENDMENT UPON THE STATUTE AMENDED.

I. At common law, amendments of a statute might be of two kinds, either altering the provisions of the amended statute by repealing or supplying them, or simply changing their application by declaring what construction should be put upon them. In the latter case, there could of course be no question of repeal; but in the former there was often a question whether or not an amendment, which did not *in terms* repeal the former act, was to be regarded as having that effect. Such would undoubtedly be the case, as a general rule, where an independent statute enacted provisions wholly at variance with another of prior date; and there would seem to be strong reasons why an amendment, equally irreconcilable with the portion of the act amended, should have the same effect. But on the other hand, the very fact that the act was designated as an amendment would seem to point to the fact that it was intended by the legislature to form an integral part of the statute amended, simply taking the place of the provisions which it supplied; and in any case, it could only be a repeal as to the

¹ Reported in 36 Pac. Rep. 658.

provisions which could not be reconciled. Accordingly, the general rule is, that an amendment does not repeal the portion of the amended statute which it supplies, but simply takes its place, and becomes a portion of the original act, with the same effect, as to matters subsequent to its date, as if it had formed a part of the original act at the time of its adoption: *Dillon v. Saloude*, 68 Cal. 270; *S. C.*, 9 Pac. Rep. 162; *Basnett v. Jacksonville*, 19 Fla. 664; *Blake v. Brackett*, 47 Me. 28; *Job v. Harlan*, 13 Ohio St. 485; *Oshe v. State*, 37 Ohio St. 494. It is consequently to be read in connection with the other portions of the original act, and its construction is to be governed by their provisions; and *vice versa*, they are thenceforth to be interpreted with reference to it: *Taylor v. Thorn*, 29 Ohio St. 569. Thus, in *Holbrook v. Nichols*, 36 Ill. 161, the ninth section of the original act provided that deeds were to be acknowledged before certain specified officers (among whom notaries were not included), and the sixteenth section enacted that powers of attorney to sell real estate should be acknowledged in the same manner as deeds. The amending act declared that deeds might thenceforth be acknowledged and proved before a notary public; and it was held that this extended to the sixteenth section of the original act, and that powers of attorney to sell real estate might be acknowledged before a notary. So, in *McKibben v. Lester*, 9 Ohio St. 627, where the amending statute provided that "under the restrictions and limitations herein provided, justices of the peace shall have . . . concurrent jurisdiction with the Court of Common Pleas in any sum over one hundred dollars and not exceeding three hundred dollars," it was ruled that the words, "under the restrictions and limitations *herein* provided," must be taken to refer to the restrictions and limitations contained in the original act, as it stood after all amendments had been inserted in their proper places; and this construction was approved and adopted in a subsequent case arising under the same acts: *Job v. Harlan*, 13 Ohio St. 485. Similarly, in *Brigel v. Starbuck*, 37 Ohio St. 280, a statute passed in 1871, relating to appeals from the probate court, authorized the taking of an appeal "from any order, decision, or decree made under 'An Act regulating the

mode of administering assignments in trust for the benefit of creditors' . . . by any person against whom such order, decision, or decree shall be made, or who may be affected thereby." The laws in reference to assignments for the benefit of creditors in force in 1871, did not authorize the creditors to select the assignee; but in 1874 an amendment to these laws was passed, giving them the right to select one, subject to the approval of the court, and it was held that the provisions of the Appeal Act of 1871 were applicable to this act, and that an appeal would lie under it, from an order of the court approving the choice of an assignee by the creditors.

An amendment, therefore, is so far a part of the original act, that the title of the original act covers it, and its own title need not be looked to in order to determine its constitutionality. If the original act is constitutional, as regards the title, so is the amendment, without regard to its title: *Brandon v. State*, 16 Ind. 197; *City of St. Louis v. Tiefel*, 42 Mo. 590; *State v. Ranson*, 73 Mo. 78. And if a statute which has been amended is repealed without referring to the amendment, the amendment is nevertheless repealed also. They both stand or fall together: *Blake v. Brackett*, 47 Me. 28; *Greer v. State*, 22 Tex. 588.

The rule that the repeal of a repealing act revives the act repealed by the latter: 1 Bl. Com. 90; *Wheeler v. Roberts*, 7 Cow. 536; *Gale v. Mead*, 4 Hill, 109; *Brown v. Barry*, 3 Dall. 365; *Peo. v. Davis*, 61 Barb. (N.Y.), 456; *Vandenburgh v. President*, 66 N. Y. 1; *Com. v. Churchill*, 2 Metc. 118; *Hastings v. Aiken*, 1 Gray, 163; *Sutherland on Stat.*, § 168, and cases cited; applies also to the case of the repeal of an amendment, and in such a case the provisions of the original act become effective again: *Longlois v. Longlois*, 48 Ind. 60. In strict language, however, this cannot be regarded as a revival, in the sense in which it is used in the former instance. As we have seen, the original act is not repealed, but merely suspended, and its provisions become effective, not by the operation of any rule of law, but merely from the fact that there is no *vis major*, after the repeal of the amendment, to keep them in the background. This rule has one qualification, however,

that seems founded in reason and justice; and that is, that when the amending statute merely repeats the language of the original act, without change, a repeal of the amendment operates, *pro tanto*, as a repeal of the original act, and there is no revival: *Moody v. Seaman*, 46 Mich. 74. It is difficult to see what valid objections can be urged against this doctrine. The sole purpose of statutory construction is to discover and render effectual the intention of the legislature; and when that body has repealed an amendment, couched in the language of the original act, the conclusion is inevitable, that they meant to repeal, not merely the amending act, but the provisions which it enacted. It requires no argument to prove that in such a case to hold to the doctrine of revival would simply be to defeat the will of the legislature.

II. The question has been very greatly complicated by the constitutional provisions now in force in most, if not all, of the United States, requiring the amended statute to be set out in full, either expressly or by requiring that the amendment state it to have been amended, "so as to read as follows." Such a provision, of course, makes a material difference in the effect of an amendment. Without such a requirement, an amendment supplies no more of the original act than is inconsistent with it; while with such a provision, the omission of any part of the original act is tantamount to a repeal. Accordingly, it is the rule that under such a constitutional requirement any provision of the original act, not appearing in the amendment, is, if within its scope, *ipso facto* repealed: *State v. Andrews*, 20 Tex. 230; *State v. Ingersoll*, 17 Wis. 631; *Goodno v. Oshkosh*, 31 Wis. 127. But, although an amendment has this effect as to omitted provisions, the amended statute is nevertheless not to be regarded, as to the provisions retained, as repealed and *de facto* re-enacted. It is rather to be held as simply continuing, and the amendment, as at common law, to become incorporated with it: *Ely v. Holton*, 15 N. Y. 595; *Moore v. Mausert*, 49 N. Y. 332; *aff. S. C.*, 5 Lans. (N. Y.) 173; *Burwell v. Tullis*, 12 Minn. 572; *Alexander v. State*, 9 Ind. 337.

This is very lucidly stated by Philips, P. J., in *Kamerick v.*

Castleman, 21 Mo. App. 587: "I understand the rule of construction in this respect to be that where a section of a statute is amended, and the amendment is in such terms that it takes the place of such section, the statute in which the original section stood, as to future acts, is to be regarded as if the amended section was incorporated therein. So much so is this the rule that, if by an act, subsequent to the amendatory act, the section of the original statute be repealed, the amendment which stood in its stead is also thereby repealed. . . . And this is so, although the amendment declares that the section is amended 'so as to read as follows.'" The language of the court, in *Gordon v. Peo.*, 44 Mich. 485, is even more to the point. "The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed it must receive a new operation; but so far as it is not changed it would be dangerous to hold that the merely nominal re-enactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since its first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized." In some States, however, the question is settled by constitutional provisions. In Alabama, for instance, the constitution declares that the section or sections amended shall be repealed: *Wilkinson v. Ketler*, 59 Ala. 306; approved in *State v. Warford*, 84 Ala. 15; S. C., 3 So. Rep. 911. And in California the Political Code enacts that the amendment of a statute shall *not* have the effect of repealing it: *Fletcher v. Prather*, the principal case (Cal.), 36 Pac. Rep. 658.

In most other respects the effect of an amendment under the constitutional provision that it "read as follows" is the same as at common law. Thus a repeal of the original act repeals the amendment: *Kamerick v. Castleman*, 21 Mo. App. 587; but the repeal of an amendment does not revive the original act. This necessarily follows from the nature of the case; for the omitted provisions being already repealed by

the amendment, the repeal of the amendment leaves nothing to be revived. The whole statute becomes merged in the amendment, and they fall together: *Peo. v. Supervisors*, 67 N. Y. 109. In Wisconsin, this is by statute expressly declared to be the effect: *Goodno v. Oshkosh*, 31 Wis. 127; Rev. St. Wis., c. 5, s. 25, subd. 3.

There remains the very curious question whether, after a statute has once been amended, an amendment of the original act will repeal it. At common law, of course, no such question could arise, unless the provisions of the two amendments were *in pari materia*, and inconsistent with each other. So long as any material was left to work over, amendments might be passed *ad libitum*, and all would stand. But with the advent of the constitutional rule, repealing by implication everything omitted in the amendment, there could no longer be anything left to work over, and a second amendment, to be operative at all, must of necessity repeal the first. Accordingly, the consensus of authority declares in favor of the repeal: *Fletcher v. Prather* (Cal.), the principal case, 36 Pac. Rep. 658; *Basnett v. Jacksonville*, 19 Fla. 664. When a section of the revised statutes was repealed and re-enacted in a changed form, a subsequent statute which in terms repealed and re-enacted the original section in still another form, was held to be a repeal of the section in its amended form, and to take the place of the amended section as part of the revised statutes: *State v. Brewster*, 39 Ohio St. 653. So in *Com. v. Kenneson*, 143 Mass. 418; S. C., 9 N. E. Rep. 761, there had been an amendment passed in 1885, and another in 1886, in each case reading "section nine of chapter fifty-seven of the public statutes is hereby amended so as to read as follows;" and then followed a sentence covering the whole ground of the original section, and impliedly repealing the preceding provisions. It was held that the intent of the legislature was plain that the first statute should take effect instead of the original, and that the second should take effect instead of the first. This is a necessary corollary of the doctrine that the amendment takes the place of the original section, for, that being the case, any reference to the correspon-

portion of the original statute must be taken to refer to the amendment.

This very obvious deduction seems to have wholly escaped the notice of the court in *Blakemore v. Dolan*, 50 Ind. 194, the only case holding a contrary doctrine to that stated above, where, though it was correctly ruled that the amendment takes the place of the section amended, the decision went on to say that a second amendment of that section was void, as the section was no longer in existence; forgetting that to all intents and purposes its existence is continued in the amendment. "When a section in an existing law is amended in the mode prescribed by the Constitution, it ceases to exist, and the section as amended supersedes such original section, and the section as amended becomes incorporated in and constitutes a part of the original Act; and the original section is as effectually repealed and obliterated from the statute as if it had been repealed by express words; and it is upon this principle that it has been held that a section which has been once amended cannot again be the subject of amendment, but the section as amended must be amended:" *Blakemore v. Dolan*, *supra*; *Draper v. Falley*, 33 Ind. 465; *Board v. Markle*, 46 Ind. 96. This decision, however, as has been shown, carries its refutation within itself, and needs no further comment except to say that it stands alone, in opposition to all the other authorities on the subject.

In striking contrast with the case last cited, it has been held in Alabama, following out the two principles that the intent of the legislature must govern, and that an amendment is incorporated with the original act, and becomes identical with the section amended, that where the constitution expressly provides that an amended section shall be repealed, an amendment to an act already amended, and therefore *pro tanto* repealed, which does not refer to the first amendment, nevertheless repeals it, in spite of the argument that an amendment of a repealed act is a nullity: *State v. Warford*, 84 Ala. 15; S. C., 3 So. Rep. 911.

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WOOD v. WEST.¹ SUPREME COURT OF NEBRASKA.

Boundaries—Field-Notes—Location of Government Corner.

Field-notes and plats of the original government survey are competent evidence in ascertaining where monuments are located in case a government corner is destroyed, or the point where it was originally placed cannot be found, or the location of the original corner is in dispute.

BOUNDARIES.

In a survey of public lands, after the township corners have been fixed and the township lines run, it is the duty of the surveyor to subdivide the township into sections and quarter sections, and to do this he is required to start at the southeast corner of the township so that the regulation found in Par. 5 of Sec. 2395, Rev. St., that "Where the exterior lines of the townships which may be subdivided into sections or half sections exceed, or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half sections in such township," etc., may be complied with.

"The sections shall be numbered respectively, beginning with the number one in the northeast section and proceeding west and east alternatively through the township with progressive numbers till the thirty-six be completed:" Par. 3, Sec. 2395, Rev. St. Therefore the surveyor would begin his subdivision of the township at the southeast corner of Section 36, and from there he would run along the township line west two miles, and establish a corner for Section 35, having established the

¹ Reported in 38 Northwestern Reporter, 938.

southwest corner of Section 36 at the distance of one mile from the southeast township corner from which he started his survey, thence he runs north to the north line of the township—and so on across the south township line until the west township line is reached. On the east township line the surveyor proceeds in the same manner, running north two miles and there marking a corner; having established a corner on the way one mile north of the southeast township corner, from which two mile corner he runs a line parallel to the south township line till he reaches the west boundary of the township and so on north on the east township line till the north corner is reached, when the township will be divided by lines into nine sections, and by corners into thirty-six sections—each section, if the township is not fractional, containing 640 acres of land—the township being six miles square.

At or near the corners established, the deputy surveyor is directed by the Revised Statutes to mark on a tree, within the section, the number of the section, and over it the number of the township within which such section may be.

Each surveyor is required to keep a field-book, and in it to note the names of the corner trees, and the numbers made on them. The true situations of all mines, salt licks, salt springs, and mill seats which come to his knowledge; all water-courses over which the line he runs may pass; and also the quality of the land. These field-books are returned to the surveyor-general, who makes out therefrom a description of the whole lands surveyed, and a "fair plat" of the townships and fractional parts of townships contained in the lands, describing the subdivisions thereof, and the marks of the corners. The description is to be transmitted to the officers who may superintend the sales, and the plat is to be recorded in books to be kept for that purpose; and a copy of it shall be kept open at the surveyor-general's office for public information, and other copies shall be sent to the places of the sale, and to the General Land Office.

With this knowledge of the duties of the government surveyors, let us come to the general question suggested by the above case of *Woods v. West*, and as the best way of making

that question still clearer we will first state a supposititious case:

A surveyor started properly at the southeast corner of a township, and, according to his instructions, ran along the township line two miles, establishing a section corner between Sections 36 and 35, as he supposed, at the distance of one mile from the township corner. As a matter of fact, the monuments erected on the ground at this corner are only three-quarters of a mile from the township corner, and by a line run parallel with the east section line one mile north, this Section 36 loses the entire western tier of sections containing forty acres each. The common corner of Sections 25, 26, 35 and 36 could not be established on account of a lake. The field notes returned to the surveyor-general, and from which he prepared his plat by which the land was to be sold, gave the correct length of one mile from the township corner on the south township line to the section corner between Sections 35 and 36, but recited that at that distance were certain monuments, which in reality were not there at all, but were one-quarter of a mile nearer to the township corner.

Two purchasers secured from the government patents, one for Section 36 and the other for Section 35, whom we will call A and B, respectively. They, of course, purchased according to the official plat returned by the surveyor-general, and each thought that he was purchasing 640 acres; but when they came to separate the two sections on the ground, if the monuments erected there were to govern, then A, the purchaser of Section 36, would have a shortage of 160 acres from the amount of land called for in his patent, and B would have a plusage of an equal amount.

The surveyor placed several trees on the quarter line, and the two corners are found just as he described them, except as to distance. Thus, the question arose directly as to which was to govern the plat recited in the patent, giving by quantity and by course and distance his full share to each purchaser, or the monuments actually placed on the ground, by which a discrepancy of 160 acres appears.

The common law rule is, beyond a doubt, that natural or artificial monuments actually placed on the land, and by their

nature permanent, will control less stable monuments, and course, and distance, and quantity are of no importance, and are considered only in case a monument cannot be discovered as a means of refixing a corner. In the case of *Powell v. Clark*, 5 Mass. 355 (1809), Parsons, C. J., says: "In a conveyance of land by deed, in which the land is certainly bounded, it is very immaterial whether any or what quantity is expressed, for the description by the boundaries is conclusive. And when the quantity is mentioned in addition to a description of the boundaries, without any express covenant that the land contains that quantity, the whole must be considered as mere description, although the quantity mentioned is an uncertain part of the description, and must yield to the location by certain boundaries, if there is a disagreement, whether the quantity mentioned is more or less than the quantity contained within the limits expressed." It is further laid down by Fowler, J., in *Hall v. Davis*, 36 N. H. 569 (1858), "that, in the description of a line what is most material and certain shall control that which is less material and uncertain; that boundaries marked on the land, as being most material and certain, are to control courses and distances; that if the plan, or the line described in a deed or charter, and the monuments made by an original survey of a tract or township of land, do not correspond, the monuments are always to determine the true location, and that the marks on the ground of an old survey, indicating the lines originally run, are the best evidence of the true location of that survey: *Hanson v. Russell*, 28 N. H. 111. The same rule has often been recognized in other jurisdictions, and it may be regarded as well settled, that where land is conveyed by a deed referring to a plan or to a charter line, between which and the actual original survey, as shown by fixed monuments upon the ground, there is a difference in the courses and distances, the location of lines and monuments, as originally located and marked on the ground are to govern, however they may differ from those represented on the plan, or described in the charter: *Missouri v. Iowa*, 7 Howard, 660; *Gratz v. Hoover*, 16 Pa. 232; see also 1 U. S. Dig., Boundaries, I and II, §§ 1-99.

The case of *Brown v. Huger*, 21 Howard, 305 (1858) is an authority for the statement that "In ascertaining the boundaries of surveys or patents, the universal rule is this: that wherever natural or permanent objects are embraced in the calls of either, these have absolute control, and both course and distance must yield to their influence, and where a survey and patent call for a boundary to run down a river to its point of junction with another and thence up that other, the rivers are obviously intended as the boundaries, and courses must be disregarded, especially when it is manifest that one of them has been interpolated through error," but this decision is founded on the common law rule as to boundaries, and no mention is made of the Revised Statutes.

It is said, in the case of *Nesselrode v. Parish*, 59 Iowa, 570 (1882), "The rule we think is well established that the true corner is where the United States Surveyor in fact established it, whether such location is right or wrong as may be shown by a subsequent survey." The "corner established" in this rule must mean that fixed by the surveyor-general on the plat returned by him and not that located on the ground, for the reason that the direction found in the Revised Statutes, § 2396, is as follows:

1. All corners marked in the surveys, returned by the surveyor-general, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

2. The boundary lines, actually run and marked in the surveys returned by the surveyor-general, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the *length* of such lines, as *returned*, shall be held and considered as the *true length* thereof

3. Each section or subdivision of section, the contents whereof have been returned by the surveyor-general, shall be held and considered as containing the *exact quantity* expressed in such return; and in Paragraph 5 of Section 2395, it

directed that all sections not fractional shall be sold as containing the complete legal quantity.

What could be a clearer declaration that the old common law rule was intended to be done away with for the purpose of the sale of public lands? Indeed, the rule itself has been held to be not a cast-iron one, but to have its exceptions. For instance, it is said in *White v. Luning*, 93 U. S. 514 (1876), that "The rule that monuments, natural or artificial, rather than courses and distances, must control, will not be enforced, where the instrument would be defeated by such construction, and where the rejection of a call for a monument would reconcile other parts of the description and leave enough to identify the land:" *Davis v. Rainsford*, 17 Mass. 207; *Jones v. Bargett*, 46 Texas, 484.

The facts in the case of *Bates v. Illinois Central Railroad Company* were these: Plaintiff brought suit in ejectment for certain lands which he claimed to be included in his patent from the government. The Chicago River was one of the boundaries called for by the survey and patent. If the river was at the place where it is laid down in the plat of the survey and mentioned in the field-notes, then the plaintiff's tract did not include the sand-bar for which he brought suit.

Mr. Justice Catron says: "The question raised is, by what rule is the public survey to which the patent refers for identity to be construed? The land granted is 102.29 acres lying north of the Chicago River, bounded by it on the south and by the lake on the east. The mouth of the river being found establishes the southeast corner of the tract. The plat of the survey, and a call for the mouth of the river in the field-notes, show that the survey made in 1821 recognized the entrance of the river into the lake through the sand-bar in an almost direct line easterly, disregarding the channel west of the sand-bar, where the river most usually flowed before the piers were erected. It is immaterial where the most usual mouth of the river was in 1821; nor whether this northern mouth was occasional, or the flow of water only temporary at particular times, and this flow produced to some extent by artificial means, by a cut through the bar, leaving the water to wash

out an enlarged channel in seasons of freshets. The public had the option to declare the true mouth of the river for the purposes of a survey and sale of the public land. And the court below properly left it to the jury to find whether the land on which the railroad lies is within the boundary of the tract surveyed and granted. According to the judge's construction of the plat and calls, and the patent bounded on the survey, the jury was bound to find for the defendant, and therefore this ruling was conclusive of the controversy."

In *Railroad Company v. Schurmeir*, 7 Wallace, 272 (1868), a government grant of land in Minnesota (9.28 acres) bounded on one side by the Mississippi, was held to include a parcel (2.78 acres) four feet lower than the main body, and which at very low water was separated from it by a slough or channel twenty-eight feet wide, through which no water flowed, but in which water remained in pools where at medium water it flowed through the depression, making an island; and where, at high water, the parcel was submerged; the whole place having, previous to the controversy, been laid out as a city, and the municipal authorities having graded and filled up the place to the river edge of the parcel.

Mr. Justice Clifford, in delivering the opinion of the court, says: "Appellants contend that the river is not a boundary in the official survey; that the tract as surveyed did not extend to the river, but that the survey stopped at the meander-posts and the described trees on the bank of the river—accordingly they insist that Lot 1 did not extend to the river, but only to the points where the township and section lines intersect the left bank of the river as shown by the meander-posts.

"The finding of the referee also shows that the meander-line of Lot 1 was run, in the official survey, along the left or north bank of a channel which then existed between that bank and a certain parcel of land in front of the same not mentioned in the field-notes nor delineated on the official plat."

"Provision was made by the Act of February 11, 1805, that townships should be 'subdivided into sections, by running straight lines from the mile corners marked as therein required, to the opposite corresponding corners and by

marking on each of said lines intermediate corners, as nearly as possible equidistant from the corners of the sections on the same.' Corners thus marked in the survey are to be regarded as the proper corners of sections and the provision is that the corners of half and quarter sections, not actually run and marked on the surveys, shall be placed, as nearly as possible, equidistant from the two corners standing on the same line. Boundary lines actually run and marked on the surveys returned are made the proper boundary lines of the sections or subdivisions for which they were intended, and the second article of the second section provides, that the length of such lines, as returned, shall be held and considered the true length thereof. Lines intended as boundaries, but which were not actually run and marked, must be ascertained by running straight lines from the established corners to the opposite corresponding corners; but where no such opposite corresponding corners have been or can be fixed, the boundary lines are required to be ascertained by running from the established corners due north and south or east and west, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional townships."

"Express decision of the Supreme Court of the State was that the river in this case and not the meander-line, is the west boundary of the lot, and in that conclusion of the State court we entirely concur:" *Schurmeir v. The Railroad*, 10 Minnesota, 82. Meander-lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

In preparing the official plat from the field-notes, the meander-line is represented as the border-line of the stream, and shows, to a demonstration, that the water-course and not the meander-line, as actually run on the land, is the boundary.

The case of *Chapman v. Polack*, decided in 1886, by the Supreme Court of California, and reported in 11 Pacific

Reports, 764, is a strong authority for the rule that land sold with reference to a plat is to be considered as bounded and as containing whatever the plat made up from the field-notes and returned by the surveyor-general to the place of sale.

The plaintiff was the owner of southeast quarter of a certain section and Mary Polack, the defendant, is owner of the northeast quarter of the same section. She contended that a certain hotel and cottages were upon the northeast quarter of Section 13. Searle, C. J., says: "The whole case turned at the trial not upon the title to the respective quarter sections of land for that was established beyond dispute, but upon the location of the dividing line between these quarter sections. If the line running through the centre of Section 13 from east to west and dividing the northeast quarter from the southeast quarter, runs north of the hotel and cottages, then the judgment of the court below is correct; if, on the contrary, that line runs south of the buildings, defendants are entitled to judgment."

"The defendants contended that the government survey fixed the lines of demarkation and situation of the hotel and buildings, and that, as thus established under the approved survey they are all in the northeast quarter of the section, and that such approved survey is conclusive and must prevail, whether right or wrong, and to admit evidence to the contrary was error. Upon the official plat of the approved survey, a certified copy of which is in evidence, the Geyser Hotel is platted and located in the northeast quarter of Section 13. In other words, the dividing or quarter section line east and west through Section 13, runs south of the buildings in dispute, and if conclusive gives the demanded premises to defendants."

The opinion gives a citation of the Revised Statutes as establishing principles for determining the boundaries and contents of the several sections, half sections and quarter sections of the public lands under the laws of Congress.

"From the data furnished by the surveyor the plats are prepared, and these official plats are made the basis of all sales of the public lands, and are solely referred to in the usual

patents to show what lands are patented: *Bates v. Illinois Central R. R. Co.*, 1 Black. 207. By the plats of public surveys lands must be identified and boundaries ascertained in all cases of the kind: *Brown v. Clements*, 3 How. 671; *Gazzam v. Phillips*, 20 How. 375."

The approved official plat of the survey, whether accurate or not, is to be deemed and taken as true and is conclusive, and neither private surveys nor parol evidence can be admitted to show that the line should in fact run differently from that run in the plat.

Taking the above cited cases of *Bates v. Illinois Central Railroad Co.*, *Railroad Co. v. Schurmair* and *Chapman v. Polack* as laying down a proper rule for the construction of patents with reference to an official plat, let us attempt to apply that rule to the case supposed by way of illustration. That the position of the monuments mentioned in the field-notes as being one mile from the township corner and so fixed on the official plat, according to which the purchase of both A and B was made, is the correct position seems clear, because the Revised Statutes say, "all corners marked in the surveys returned by the surveyor-general shall be established as the proper corners—and the length of the lines returned shall be taken as the true length thereof;" and the statutes do not say all corners established by the survey on the ground and returned to the surveyor-general shall be established as the proper corners—nor do they say the monuments fixed on the field by the surveyor-general shall be taken as determining the true length of the boundary lines.

Just as in the case of *Chapman v. Polack*, the owner of the section, in which, on the official plat of the survey, the hotel and cottages were placed, was protected in his rights and the line as run, established as the true boundary, so in our case the line as run in the plat, establishing a full section, must be taken as the true boundary line, and the length of it is fixed by the return of the surveyor-general, and A and B purchasing by that return have each vested rights in exactly what the official plat gives them, that is, a full section.

The government is obliged to stand by an original survey

by which it conveys land and under which right became vested, and therefore where a man bought land according to an official survey, duly filed in the proper office, the conveyance could not be set aside on the ground that by a subsequent survey it was found that his house was partly in another quarter section from that for which he obtained a patent: *Lindsey v. Hawes*, 2 Black. 554 (U. S.).

Where a map or plan of a tract of land with lines drawn upon it marking the boundaries and with the natural objects upon its surface laid down, is referred to in a deed containing a description of the premises therein conveyed, this map or plan is to be regarded as giving the true description of the land conveyed as much as if it was expressly recited and marked down in the deed itself: *Vance v. Fore*, 24 Cal. 436; *Black v. Sprague*, 54 Cal. 266; *Cragin v. Powell*, 128 U. S. 691.

In the case of *Beaty v. Robertson*, 30 N. E. Rep. 702 (1892), Supreme Court of Indiana, there was a variance between the plat and the field-notes of the original survey of public lands, and Miller, J., says, quoting from *Doe v. Hildreth*, 2 Ind. 274: "If there was any variance between the plat and field-notes, the former must control; for it represented the lines and corners as fixed by the surveyor-general, and by which the land was sold, and the law declares that the corners and boundaries as returned by, not to, that office, shall be the corners and boundaries." Mr. Justice Miller goes on to say, "In *Vance v. Fore*, 24 Cal. 436, it was said: 'The map may be regarded as a daguerreotype of the land which the grantor intended to convey.' In *Cornett v. Dixon*, 11 S. W. Rep. 660, a patent made in accordance with a plat and survey was held sufficient to control the length of a line as given in the field-notes of the surveyor."

In our supposed case the plat and field-notes agree as to the distance on the township line from township corner to section corner, and disagree only in the placing of certain monuments, now under this case of *Cornett v. Dixon*, *supra*, it seems that the plat is of superior weight as evidence of what land is granted by a patent to any other evidence. The court say in *Cornett v. Dixon*, "The patent is in strict accordance

with this plat and survey. The patent being in accordance with the plat and survey, as to the length of the said line, we cannot say that the contradictory statements as to the distance of the line contained in the minutes of the surveyor's proceedings are sufficient to justify the conclusion that the statement contained in the plat and patent as to the distance of said line is a mistake. On the contrary said statement furnishes strong, if not conclusive, evidence of the correctness of the length of the line.

So take the contradictory statements in the minutes of the surveyor in our case as to the position of certain monuments and the length of the line, and we can no more conclude that the length of the line as given in the field-notes and shown in official plat is a mistake than that in the above case the length of the line returned by the surveyor-general was a mistake.

In *Chan v. Brandt*, 47 N. W. Rep. 461 (1890), Supreme Court of Minnesota, Vanderburgh, J., says, "The boundaries, as established by the government surveyors and returned to, and accepted by the government are unchangeable, and control the description of lands patented, and it is well settled that mistakes in the surveys cannot be corrected by the judicial department of the government:" *Cragin v. Powell*, 9 Sup. Ct. Rep. 203.

The surveyor-general in his return established his section corner at the distance of one mile from the southeast township corner, and this he was right in doing even though the field-notes had given a less distance, for the surveyor-general is to correct inaccuracies in measurements, etc., of his deputy surveyors, though, of course, he would have no power to move the monuments.

The section line is not established by the surveyor, the government establishes it through the surveyor and not until the official plat returned by the surveyor-general is approved by the government are the lines established and by that plat the government sell its lands. "When the boundary is not fixed and known, but is in dispute, courses, distances and contents may be considered in fixing and knowing the true boundary. When the dispute is as to which of two points is

the established corner, and one point is where such corners are usually established, and such as to give to each owner the quantity of land purchased, and the other is remote, and gives to some more and to others less, than the quantity of land purchased, it will surely require less evidence to convince the mind that the former is the true line than that the latter is." This is taken from the opinion in the case of *Hanson v. Township of Red Rock*, 57 N. W. Rep. 11 (1893). The case itself rather leaves out of consideration the directions of the Revised Statutes and proceeds according to the old common law rules to determine that "When the boundaries of land are fixed, known and unquestionable monuments, although neither courses nor distances, nor the computed contents correspond, the monuments must govern." In this statement all the directions of the Revised Statutes are put out of sight and it is not remembered that all corners established on the plat by the surveyor-general by course and distance shall be taken to be the true corners of the section—and the length of the boundary lines returned shall be considered the true length thereof, nor that the sections are to be sold as containing the legal quantity of lands.

One of the best cases on this subject of boundaries is *Goltermann v. Schiermeyer*, 19 S. W. Rep. 484, May 9, 1892, and as it establishes my point and construes to a certain extent the directions given in the Revised Statutes in reference to the survey of public land, it may be well to go into the case rather fully, and even to state the more important facts upon which the judgment of the court is founded. The controversy in this case arose out of a dispute as to the true line dividing the north half and the south half of a certain section. Goltermann obtained two patents from the United States, in one the land conveyed is described as Lot 2 of the northwest quarter of this section, containing 103.27 acres "according to the official plat of the survey of said land returned to the general land office by the surveyor-general;" and in the other the land is described as Lot 1 in the northwest quarter and the west half of the northeast quarter of this section, containing 160 acres, with a similar reference to an official plat.

The plaintiff in this case is one of the heirs of Goltermann, and he acquired the interest of the other heirs in the land, except a part of the north line in dispute. Plaintiff put in evidence a survey made by a county surveyor pending this suit, and a copy of the plat of the entire township as returned by the surveyor-general.

The defendant put in evidence his title and certain surveys, one of which is known as the Krepel survey; Krepel, in making his survey, found the quarter section corner on the east section line to be 43.20 chains from the southeast section corner, thus making an excess of 3.20 chains over the government survey. From that quarter section corner he ran a line west, parallel to the south section line, and planted a corner on the west section line.

The survey put in evidence by the plaintiff also varied from the government plat, in as much as the distance between the western section corners measured on it 85.54 $\frac{1}{2}$ chains instead of 85.50 chains as laid down on the government plat. The excess of 4 $\frac{1}{2}$ links was divided between the lines proportionately according to the length of each, as shown on the government plat, making the west line of the southwest quarter 40.02 chains, and the west line of the northwest quarter 45.52 $\frac{1}{2}$ chains. From the point thus obtained he ran a straight line to the government quarter section corner on the east section line. The difference between the two surveys is a strip of land 4.38 chains wide on the west section line running east three-quarters of a mile to a width of 1.06 chains.

On the above state of facts, Black, J., says: "As the United States sold the north half of the section, and set off to the State for schools the south half, by reference to the survey returned by the surveyor-general, it is perfectly obvious that the section must be divided according to that plat, and the Act of Congress relating to the survey of the public domain. The patents from the United States to Goltermann all refer to the official plat of the survey returned by the surveyor-general to the General Land Office, for a description of the land granted. The land having been granted according to the plat, the plat and the figures and marks thereon designating this corner

became a part of the grant, the same as if the descriptive features represented by them had been written out in full in the patents. In short the plat, with all its marks and figures and the field-notes, became a part of the patent for all purposes of identifying the land granted. But it is here insisted that the figures '40.00,' representing the length of the west line of the southwest quarter, and the figures '45.50' representing the length of the west line of the northwest quarter, are no part of the plat. These figures as they appear on the plat are in red ink, showing that they do not represent distances actually measured in the field. It is, therefore, insisted that they were placed on the plat without authority of law, and should be rejected and disregarded. The Acts of Congress of May 10, 1800, and February 11, 1805, are carried into Revised Statutes, U. S., 1878 (second edition), to which reference is made. Section 2396 provides, among other things: 1st. 'All the corners marked in the surveys returned by the surveyor-general shall be established as the proper corners of sections or subdivisions of sections they were intended to designate, and the corners of half and quarter sections not marked on the survey shall be placed, as nearly as possible equidistant from two corners which stand on the same line.' The claim is that the words 'marked in the surveys returned,' mean corners actually established on the ground. We think the words have a much broader meaning. This will be more apparent by referring to some of the duties of the surveyor-general in respect of sections on the west township line. Section 2395 provides that where townships which are subdivided exceed or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half sections, and that these irregular sections and half sections shall be sold as containing only the quantity expressed in the returns and plats, and all others as containing the legal quantity. It is, therefore, the duty of the surveyor, not only to note this excess or deficiency, but to calculate the contents of these irregular subdivisions, and to note the quantity on the surveys returned. Hence, it is clear that the 'surveys

returned' properly show more than mere lines actually run and corners planted. If it is his duty to calculate the areas, and state the result on the plat, it is certainly competent for him to note the basis upon which he made the calculation, and especially so since the irregular subdivisions of the sections lying in the northern and western ranges of sections must be sold as containing the quantity expressed on the plat. The statutes are general in their terms, and many things are left to the discretion of the surveyor-general and the land department. We entertain no doubt but the surveyor-general had full power and authority by himself or deputies to designate these distances on the plat. But for the purposes of this case, and no other, let it be assumed that these figures should have been omitted from the plat, still it does not follow that the courts can undo what the surveyor-general and his deputies have done. He by himself or his subordinates fixed this quarter section corner on the plat, by stating its distance from section corners, and the government accepted the plat and sold the land pursuant thereto. By these acts the government, through its political departments, adopted the plat and all the marks and figures thereon. If this plat was incorrect, it was for the land department to reject it. That department had the power to accept or reject it. It did accept the plat, and that act is not reviewable by the courts. The government having accepted the plat, and sold the land pursuant to it, the courts have nothing to do but ascertain its meaning, and give effect to that meaning. It follows from what has been said, that we are to take this plat, with the figures thereon, and read it as part of the patents. Guided by the plat, there is no difficulty whatever in finding the principle upon which this dividing line should be run. In running the north section line west through to the township line it fell 5.50 chains north of the mile monument set in the township line. The west section line is therefore 85.50 chains in length. The plat also makes the west line of the southwest quarter 40 chains and the west line of the northwest quarter 45.50 chains. If, as in this case, an accurate measurement shows that the section line exceeds 85.50 chains, then the

excess must be divided between the quarter section lines in the proportion of the length of those lines as stated on the plat. The point thus ascertained is the true quarter section corner, and a straight line from that point to the east quarter section corner is the true dividing line.

"On the other hand, there are cases which insist that the monuments set in the field, when actually found, govern and control all other descriptions, and it is said in *Goltermann v. Schiermeyer*, *supra*, the monuments set by the deputy United States Surveyor for the west section corners must control as to the proper location of those corners.

"In the late Nebraska case, *Woods v. West*, 58 N.W. Rep. 938, which we have taken as the text, it is held, as we have seen, the field-notes and plat are competent evidence in ascertaining where monuments are located, in case a government corner is destroyed or the point where it was originally placed cannot be found, or the location of the original corner is in dispute; but when it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point, such location must control, even though it is at a place different from that given in the plat and field-notes. This decision of the Supreme Court of Nebraska is reached without reference to the Revised Statutes of the United States, and simply on the ground that the monuments erected upon the land are facts; the field-notes and plat returned by the surveyor-general, indicating course, distance and quantity, are but description which serve to assist in ascertaining those facts. This is undoubtedly true as a general principle of law, but it is altered by the explicit direction in § 2396, Rev. St., February 11, 1805, that, the boundary lines actually run and marked in the survey returned by the surveyor-general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the *length of such lines as returned* shall be held and considered as *the true length thereof*—apparently regardless of monuments placed erroneously in the field."

The Chief Justice, in giving his opinion in the case of *Woods v. West*, *supra*, says: "There is no room for doubt,

that if a certain known corner is the point at which the government surveyors located the corner of Sections 8, 9, 16 and 17, the one in dispute, then so much of the government field-notes as assume to state the length of the lines of the original survey is *inaccurate and unreliable*."

Such a statement is surely made without reference to the Revised Statutes as to the force to be given to the statement of the surveyor-general as to the length of the boundary lines.

McClintock v. Rogers, 11 Ill. 279 (1849), holds that in construing a patent from the United States which describes land granted by the number of the section, township and range, courts will look to the plat and field-notes, made and returned to the surveyor-general by the government surveyors, in order to locate the land. The lines actually run upon the grounds by the original surveyor become the true external boundaries of all lands sold by the government, if they can be ascertained by reference to the monuments erected upon the land by the surveyor.

In the case of Jones v. Kimble, 19 Wis. 452, the plat and field-notes are taken as giving the proper boundaries; but court expressly states that that was because the monuments located in the field could not be found, and that if they had been found they would have governed all other descriptions.

Martin v. Carlin, 19 Wis. 477, the court refused to go out of a section as established to reach a natural object or monument admitted to be erroneously placed within the section and made a boundary of.

See also Whitney v. Limber Co., 78 Wis. 240.

If the sections of the Revised Statutes quoted are to be followed, it would seem clear that the monuments located by the surveyor on the ground one-quarter of a mile too near to the southeast township corner ought to be ignored, and the length of the line, as returned by the surveyor-general, giving to A and B, respectively, the amount of land each thought he was purchasing, should be considered as the true length thereof.

J. HOWARD RHODES.

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FLORA v. RUSSELL.¹ SUPREME COURT OF INDIANA.

The mere fact that a party acts on the advice of an attorney in suing out a search warrant, does not absolutely show absence of malice, and probable cause, especially where, in communicating the facts to the attorney, he so enlarges a mere suspicion as to make it appear that he has some positive information. In such a case the advice of the attorney is no defence.

ADVICE OF COUNSEL AS A DEFENCE TO A SUIT FOR MALICIOUS PROSECUTION.

I. The action for malicious prosecution depends upon the two conditions, usually interdependent, of malice and want of probable cause; in other words, the defendant must have instituted the proceeding out of which the suit grew from a bad motive, and have had no reason to believe the plaintiff guilty of the offence charged. These two conditions must, as a general rule, co-exist. If there was really good ground to believe the plaintiff guilty, the motive of the defendant in prosecuting is immaterial; and, on the other hand, if he had no valid reason to believe in his guilt, the very purest motive ought not to relieve him from liability for negligence, if for nothing else. As a matter of fact, malice is much more frequently inferred from the want of probable cause than proven by direct evidence. It follows, then, that anything which tends to disprove malice or to show probable cause is, or ought to be, admissible in evidence, in the one instance to mitigate damages, in the other to exonerate from all liability.

¹ Reported in 37 N. E. Rep. 523.

II. In all matters involving legal questions, the opinion of an attorney is necessarily of great and controlling weight; and, therefore, when he pronounces it as his opinion on a given state of facts that they warrant a criminal prosecution, and that is set on foot, it is only fair to infer that the prosecution would not have been begun without that opinion. The opinion, then, is really the efficient cause of the suit; and the prosecutor, who has acted according to his best lights, ought not justly to be held liable. The general rule, therefore, is, that the advice of an attorney is admissible in evidence to disprove malice and establish probable cause; and, if connected with perfect good faith on the part of the prosecutor, will exonerate him from all liability: *Miller v. Chic., M. & St. P. Ry. Co.*, 41 Fed. Rep. 898; *Wicker v. Hotchkiss*, 62 Ill. 107; *Walker v. Camp*, 69 Iowa, 741; *Acton v. Coffman*, 74 Iowa, 17; *Soule v. Winslow*, 66 Me. 447; *Perry v. Sulier*, 92 Mich. 72; S. C., 52 N. W. Rep. 801; *Cole v. Curtis*, 16 Minn. 182; *Jonasen v. Kennedy (Neb.)*, 58 N. W. Rep. 122; *Bartlett v. Brown*, 6 R. I. 37; *Newton v. Weaver*, 13 R. I. 616. The attorney should be competent to give the advice sought; or at least the defendant should have no reason to suspect him of incompetency: *Schippel v. Norton*, 38 Kans. 567; and should be a man of integrity: *Walter v. Sample*, 25 Pa. 275. It would be monstrous to hold that anyone, by applying to a weak man, or an ignorant one, might shelter his malice in bringing an unfounded prosecution: *Hewlett v. Cruchley*, 5 Taunt. 277. But it is sufficient that he be reputed competent in the community in which he lives: *Murphy v. Larson*, 77 Ill. 172. If he is a regularly licensed attorney, his competency will be presumed, and the defendant need not adduce proof thereof: *Horne v. Sullivan*, 83 Ill. 30. He must also be one whom defendant had no reason to suspect of prejudice or bias: *Smith v. King*, 62 Conn. 515; S. C., 26 Atl. Rep. 1059. If he is interested in the subject matter of the prosecution, and defendant have knowledge of it, his advice will be no defence, though it be given honestly, for the defendant in such a case has no right to expect an unbiased opinion: *White v. Carr*, 71 Me. 555.

The rule applies to advice given by a district, county, or prosecuting attorney, equally with private counsel: *Jessup v. Whitehead* (Colo.), 29 Pac. Rep. 916; *Wright v. Hanna*, 98 Ind. 217; *Thurston v. Wright*, 77 Mich. 96; *Huntingdon v. Gault*, 81 Mich. 144; S. C., 45 N. W. Rep. 970; *Webster v. Fowler*, 89 Mich. 303; S. C., 50 N. W. Rep. 1074; *Norrell v. Vogel*, 39 Minn. 107; S. C., 38 N. W. Rep. 705; *Baldwin v. Weed*, 17 Wend. 224; *Laughlin v. Clauson*, 27 Pa. 328. It has been claimed that the rule should apply more strongly to these than to private counsel, on account of their official character, and that their advice should be a complete defence; but this was rejected by the court on unassailable grounds. "Prosecuting officers in this county do not stand on a higher plane of learning or ability than their brethren of the profession who do not hold office; nor are they held in higher esteem for honor or integrity of purpose. If this be true (and it certainly cannot be doubted), there is no good reason why the advice of a county or district attorney should be treated as a more effective shield than that of the private lawyer, who is also an officer of court, and entitled to its confidence and respect:" *Sebastian v. Cheney* (Tex.), 24 S. W. Rep. 970. It might also have been added that there were powerful reasons why it should have even less effect: that the ablest members of the Bar would not accept the office of district attorney except in the large cities; that even there, as in all other places, the office was liable to become the prey of professional politicians; and that in many places it is given to men of youth and inexperience, as a means to help them rise in their profession.

The person whose advice is sought must be an attorney; and if he is not, his advice will be of no avail. The fact that he held himself out as an attorney, and that the defendant believed him to be such, does not alter the case: *Murphy v. Larson*, 77 Ill. 172. No person unlearned in the law is competent to give such advice; and consequently the advice of a pettifogger, who has been for years engaged in suits before justices, is no defence, as there is no presumption that he knows more than other laymen: *Stanton v. Hart*, 27 Mich. 539.

The same is true of the advice of a police officer: *Coleman v. Heurich*, 2 Mackey (D. C.), 189; and of a detective: *Breitnesser v. Stier*, 13 Phila. 80.

There is, however, some little difference of opinion on the question of the effect in this regard of advice given by a justice of the peace or magistrate. The vast preponderance of authority gives it the same status as any other lay advice, and declares it to be no defence: *Rigden v. Jordan*, 81 Ga. 668; *Finn v. Frink*, 84 Me. 261; S. C., 24 Atl. Rep. 851; *Straus v. Young*, 36 Md. 246; *Olmstead v. Partridge*, 82 Mass. 381; *Cooney v. Chase*, 81 Mich. 203; S. C., 45 N. W. Rep. 833; *Brobst v. Ruff*, 100 Pa. 91; *Beihofen v. Loeffert* (Pa.), 28 Atl. Rep. 217; *Sutton v. McConnell*, 46 Wis. 269; S. C., 50 N. W. Rep. 414; *Burgett v. Burgett*, 43 Ind. 78; *Williams v. Van Meter*, 8 Mo. 339; *Gee v. Culver*, 12 Ore. 228. "Justices of the peace are not required to be learned in the law. In fact, generally throughout the State they are not. They are not qualified by a course of study to give advice on questions of law. They do not pursue it as a profession. They are not charged with the duty of advising any person to commence a prosecution. They ought not to act as attorney or agent for one in regard to a prosecution he is about to institute before them. . . . An educated business man may be much better qualified than many inexperienced justices of the peace to advise as to the law; yet I am not aware that the advice of such a person has ever been held to protect against damages for a malicious prosecution:" *Brobst v. Ruff*, *supra*.

On the other side are *Holmes v. Horger* (Mich.), 56 N. W. Rep. 3, which does not mention *Cooney v. Chase*, 81 Mich. 203, which it seems to overrule; *Thomas v. Painter*, 10 Phila. 409, practically overruled by *Brobst v. Ruff*, *supra*; *Sisk v. Hurst*, 1 W. Va. 53; and *Ball v. Rawles*, 93 Cal. 222; S. C., 28 Pac. Rep. 937, which rests upon a mistaken view of *Hahn v. Schmidt*, 64 Cal. 284; S. C., 30 Pac. Rep. 818. All that was decided in the latter case was, that when a complaint is made before a justice, and he issues a warrant thereon under a mistaken conception of the law, the person who made the complaint is not liable, as the justice issued the warrant on his

own responsibility. This is a correct view of the law: *Leigh v. Webb*, 3 Esp. 165; *Cohen v. Morgan*, 6 D. & R. 8; *Carratt v. Morley*, 1 Gale & D. 275; *Teal v. Fissel*, 28 Fed. Rep. 351; *Newman v. Davis*, 58 Iowa, 447; S. C., 10 N.W. Rep. 852; *Smith v. Austin*, 49 Mich. 286; but is a wholly different case from the issuance of a warrant by a justice on request of the complainant, after obtaining his advice. In the latter case the complainant is active, in the former passive. *Ball v. Rawles*, therefore, is of no authority.

There is, however, no good reason why the advice of a justice or magistrate, who is also an attorney, should not be a defence; and this has been held to be the law: *Turner v. Dinnegar*, 20 Hun (N. Y.), 465. This doctrine was denied in *Mark v. Hastings* (Ala.), 13 So. Rep. 297, on the ground that in such a case the advice was asked and given, not as an attorney, but as a magistrate, and that "however learned in the law, it would be an impolitic and unwarrantable extension of the rule to allow the advice or opinion of a justice of the peace in regard to the sufficiency of the grounds for the institution of a prosecution before him." While this may be true, it does not touch the point. The only question is whether the person who advises is competent and disinterested; and if so, it makes no difference whether he is attorney, magistrate, or judge.

This question was very fully discussed in *Monaghan v. Cox*, 155 Mass. 487; S. C., 30 N. E. Rep. 467, where the magistrate was also an attorney. "*Olmstead v. Partridge* was decided in 1860. Since that time the authority to issue warrants for criminal offences has been taken from the ordinary justices of the peace and is lodged on officers specially designated for the purpose, and in trial justices, and the justices of police, district and municipal courts. A very large majority of the gentlemen now having this authority are members of the Bar, and all have been selected with care, and are known to the community as wise and discreet men. Besides this, they are disinterested and independent and not, as was sometimes felt to be the case with justices of the peace under the old system, under the control or influence of particular persons. No one expects that the old order of things

will be reinstated, or that less care will in the future be exercised in the selection of the magistrates, to whom, under the present system, the duty of receiving complaints is intrusted. If then it is clear, that our magistrates of this class possess the qualifications and are free from the disqualifications mentioned in the opinion of the court in *Olmstead v. Partridge*, the same principles which led the court to its decision in that case now require us to decide differently. . . . Upon the question whether, under certain circumstances stated, a formal complaint ought to be made, and a warrant issued, we cannot say that it is improper for such magistrates to give advice, and it follows that no good reason now exists why in this Commonwealth evidence that a complaint was made upon the advice of such a magistrate should be inadmissible upon the question of probable cause."

This is true, so far as concerns the case in hand, and the case of any magistrate or justice who is also an attorney; but it cannot be held to apply to magistrates or justices who are not learned in the law. As to them the old rule still applies. And in any case the advice of a justice, who is not responsible to any one for his action, ought not to be given the same effect as that of a regular attorney. This is acknowledged by the court in *Monaghan v. Cox*, *supra*.

In any case, the advice of a layman, if honestly sought, will go in mitigation of damages: *Murphy v. Larson*, 77 Ill. 172.

III. The advice of an attorney is by no means an absolute justification; but merely evidence to go to the jury of the absence of malice and the existence of probable cause. "It is not the advice that rebuts the presumption of malice, but the innocence of defendant's conduct, of which his seeking advice is merely evidence. Whether the advice makes out a good defence or not, depends on the good faith with which it is sought and followed. Such good faith is shown by the candor, fullness and fairness of the clients' statement, upon which the advice was based, and its adequacy in those respects, whenever it is disputed, is for the jury to determine upon all the evidence:" *Smith v. Walter*, 125 Pa. 453; *S. C.*, 23 W. N. C. 538; 17 Atl. Rep. 466; *Lemay v. Williams*, 32 Ark. 166;

Skidmore v. Bricker, 77 Ill. 164; Fadner v. Filer, 27 Ill. App. 506; Smith v. Zent, 59 Ind. 362; McCarthy v. Kitchen, 59 Ind. 500; Lytton v. Baird, 95 Ind. 349; Flora v. Russell (Ind.), the principal case, 37 N. E. Rep. 593; Mesher v. Iddings, 72 Iowa, 553; Hall v. Kehoe, 8 N. Y. Suppl. 176; Ramsey v. Arrott, 64 Tex. 320; Glasgow v. Owen, 69 Tex. 167; S. C., 6 S. W. Rep. 527; Shannon v. Jones, 76 Tex. 141; S. C., 13 S. W. Rep. 477. Accordingly, the conduct of the plaintiff must be free from any bad faith. In the first place, he must have given to the attorney, as the basis for his advice, a full and fair statement of the facts of the case, or he will still be liable: Guthbert v. Galloway, 35 Fed. Rep. 466; Blunt v. Little, 3 Mason, 102; Bliss v. Wyman, 7 Cal. 257; Potter v. Seal, 8 Cal. 217; Aldridge v. Churchill, 28 Ind. 62; Scotten v. Longfellow, 40 Ind. 23; Paddock v. Watts, 116 Ind. 146; S. C., 18 N. E. Rep. 518; Legan v. Maytag, 57 Iowa, 107; Mesher v. Iddings, 72 Iowa, 553; Schippel v. Norton, 38 Kans. 567; Cointement v. Cropper, 41 La. An. 303; S. C., 6 So. Rep. 127; Weil v. Israel, 42 La. An. 955; S. C., 8 So. Rep. 826; Wells v. Noyes, 12 Pick. 324; Donnelly v. Daggett, 145 Mass. 314; Stevens v. Fassett, 27 Me. 266; Huntington v. Gault, 81 Mich. 144; S. C., 45 N. W. Rep. 970; Baldwin v. Weed, 17 Wend. 224; Davenport v. Lynch, 6 Jones N. C. L. 545; Ash v. Marlow, 20 Ohio, 119; Walter v. Sample, 25 Pa. 275; Fisher v. Forrester, 33 Pa. 501; Emerson v. Cochran, 111 Pa. 619; Leahey v. March, 155 Pa. 458; S. C., 32 W. N. C. 292; 26 Atl. Rep. 701; Hall v. Hawkins, 5 Humph. (Tenn.) 357; Kendrick v. Cypert, 10 Humph. (Tenn.) 291; Forbes v. Hagman, 75 Va. 168; Sherburn v. Rodman, 51 Wis. 474; Palmer v. Broder, 78 Wis. 483; S. C., 47 N. W. Rep. 744. It is therefore not enough to merely prove the consultation with the attorney; the facts laid before him must also be proved: Aldridge v. Churchill, 28 Ind. 62; Porter v. Knight, 63 Iowa, 365; Blunt v. Little, 3 Mason, 102.

A suppression of material facts will render the defendant liable. "Any evasion or concealment by a prosecutor in his statement of case to his counsel, or any failure on his part to

make a full disclosure of all the facts within his knowledge concerning it, will deprive him of the protection which advice founded upon an honest, fair and full presentation of the case affords. An incomplete and unfair statement warrants an inference that the advice was sought as "a mere cover for the prosecution, and an opinion based on such statement is an unsatisfactory reply to evidence of malice and want of probable cause." *Barhight v. Tammany* (Pa.), 28 Atl. Rep. 135; *Galloway v. Stewart*, 49 Ind. 156; *Stevens v. Fassett*, 27 Me. 266; *Willard v. Holmes*, 21 N. Y. Suppl. 998; S. C., 2 Misc. Rep. 303. Thus, defendant is liable if he fail to state that property taken by plaintiff was taken openly and under a claim of right: *Roy v. Goings*, 112 Ill. 656; that the plaintiff requested him to examine the property alleged to have been stolen, and that he refused: *Norrell v. Vogel*, 39 Minn. 107; S. C., 38 N. W. Rep. 705; or that there are facts tending to exculpate the plaintiff: *Jessup v. Whitehead* (Colo.), 29 Pac. Rep. 916. The defendant will not be exonerated if he so exaggerate the facts as to mislead the attorney: *Flora v. Russell* (Ind.), the principal case, 37 N. E. Rep. 593. It is competent to ask the attorney, as an expert, whether or not, if the facts stated had been different in a specified particular from those stated by defendant, he would have given the advice he did: *Paddock v. Watts*, 116 Ind. 136; S. C., 18 N. E. Rep. 518.

The defendant, however, is not bound to disclose all the facts in the case, but only those which he knows, or might have ascertained by reasonable diligence: *Motes v. Bates*, 80 Ala. 382; *Wicker v. Hotchkiss*, 62 Ill. 107; *Manning v. Finn*, 23 Neb. 511; *R. R. v. Hunt*, 59 Vt. 294. But a failure to state facts exculpatory of plaintiff, which the defendant might have known by the slightest inquiry of persons associated with himself in the transaction complained of, he being in possession of information which would have put a prudent man on inquiry respecting those facts, will make him liable: *Jessup v. Whitehead* (Colo.), 29 Pac. Rep. 916. If, however, the reputation of his informants for veracity is bad, a failure to make inquiry about the latter will not remove the

defendant from the protection of the rule, when there were no known facts to arouse suspicion as to the truth of their statements: *Jordan v. R. R.*, 81 Ala. 220; S. C., 8 So. Rep. 191. The facts which the defendant is obliged to disclose are only those which a man of ordinary intelligence is bound to know are material: *Peterson v. Toner*, 80 Mich. 350; S. C., 45 N. W. Rep. 346.

IV. The prosecution must also be carried on in good faith, after the advice has been given: *Wells v. Noyes*, 12 Pick. 324; *Cole v. Curtis*, 16 Minn. 182; *Ravenga v. Markintosh*, 2 B. & C. 693. A prosecution to force collection of a debt is not in good faith: *Neufeld v. Rodeminiski* (Ill.), 32 N. E. Rep. 913; nor if caused by passion and a desire to injure the plaintiff: *Fugate v. Miller*, 109 Mo. 281; S. C., 19 S. W. Rep. 71; *Sharpe v. Johnston*, 76 Mo. 660; nor if the defendant did not in fact believe the plaintiff guilty: *Center v. Spring*, 2 Iowa, 393; *Johnson v. Miller*, 82 Iowa, 693; nor had reason to believe him so: *Brewer v. Jacobs*, 22 Fed. Rep. 217.

V. The defendant, if he acts in good faith, is not liable for the error of the attorney in advising the prosecution: *Stone v. Swift*, 4 Pick. 389; *Wells v. Noyes*, 12 Pick. 324; *Hall v. Suydam*, 6 Barb. (N. Y.) 83; *Walter v. Sample*, 25 Pa. 275; *Richardson v. Virtue*, 72 Hun (N. Y.) 208. But see *Hewlett v. Cruchley*, 5 Taunt. 277; and *Hall v. Hawkins*, 5 Humph. 357.

VI. There has been much dispute as to the proper application of the evidence of advice. Some authorities hold that it goes to the question of malice only: *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Wright v. Hanna*, 98 Ind. 217; *Ramsey v. Arrott*, 64 Tex. 320. Others claim that it relates only to probable cause: *Genevey v. Edwards* (Minn.), 56 N. W. Rep. 578; *Sharpe v. Johnson*, 59 Mo. 557; *Hall v. Kehoe*, 8 N. Y. Suppl. 176. The better opinion, however, is that which makes advice evidence of both want of malice and the existence of probable cause: *Wilkinson v. Arnold*, 11 Ind. 45; *Smith v. Zent*, 59 Ind. 362; *McCarthy v. Kitchen*, 59 Ind. 500; *Gould v. Gardner*, 8 La. An. 11; *Phillips v. Bonham*, 16 La. An. 387; *Monaghan v. Cox*, 155 Mass. 487; S. C., 30 N. E.

Rep. 467; *Thurston v. Wright*, 77 Mich. 96; *Shannon v. Jones*, 76 Tex. 141; S. C., 13 S. W. Rep. 477; *Hurlbut v. Boaz* (Tex.), 23 S. W. Rep. 446. The question of the effect of this evidence is solely for the jury: *Smith v. Walter*, 125 Pa. 453; S. C., 23 W. N. C., 538; 17 Atl. Rep. 466.

VII. The whole subject is very well summed in the following extract from the opinion of the court in *Stevens v. Fassett*, 27 Me. 266, 283: "If a person with an honest wish to ascertain whether certain facts will authorize a suit or a criminal prosecution, lays all such facts before one learned in the law, and solicits his deliberate opinion thereon, and the advice obtained is favorable to the suit or prosecution, which is thereupon commenced, it will certainly go far, in the absence of other facts, to show probable cause, and to negative malice. But if it appears that he withheld material facts, within his knowledge, or which, in the exercise of common prudence, he might have known; or if it appears that he was influenced by passion or a desire to injure the other party, and especially if he received from another, learned in the law, whose counsel he sought, advice of a contrary character upon the same question, the opinion which he invokes in defence, ought not to avail him, and it is well understood that it cannot be a protection."

[For a collection of cases on this subject, see 14 Am. & Eng. Enc. of Law, 52, etc.]

R. D. S.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to William Draper Lewis, Esq., 726 Drexel Building, Philadelphia, Pa.]

THE LAW RELATING TO REAL ESTATE BROKERS, as decided by the American Courts. By STEWART RAPALJE. New York: Baker, Voorhis & Co., 1893.

DIGEST OF INSURANCE CASES, for the year ending October 31, 1893. By JOHN FINCH. Indianapolis: The Rough Notes Co., 1893.

CASES ON CONSTITUTIONAL LAW, with Notes. Part II. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever, 1894.

AMERICAN RAILROAD AND CORPORATION REPORTS, being a Collection of the Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago: E. B. Myers & Co., 1893.

THE BANKING QUESTION IN THE UNITED STATES, Report of the meeting held on January 12, 1893, under the auspices of the American Academy of Political and Social Science. Addresses by HORACE WHITE, MICHAEL D. HARTER, A. B. HEPBURN, J. H. WALKER, HENRY BACON and W. L. TRENHOLM. Philadelphia: American Academy of Political and Social Science, 1894.

THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE. By EDWIN E. BRYANT. Boston: Little, Brown & Co., 1894.

POCKET MANUAL OF RULES OF ORDER FOR DELIBERATIVE ASSEMBLIES. By Lieut.-Colonel HENRY M. ROBERT. Chicago: S. C. Griggs & Co., 1894.

A MANUAL OF THE STUDY OF DOCUMENTS TO ESTABLISH THE INDIVIDUAL CHARACTER OF HANDWRITING AND TO DETECT FRAUD AND PERJURY, including Several New Methods of Research. By PERSIFOR FRAZER. Illustrated. Philadelphia: J. B. Lippincott Company, 1894.

TREATISE AND TOPICS IN AMERICAN DIPLOMACY. By FREEMAN SNOW, Ph.D., LL.B., Harvard University. Boston: The Boston Book Company, 1894.

A TREATISE ON DISPUTED HANDWRITING AND THE DETERMINATION OF GENUINE FROM FORGED SIGNATURES, THE CHARACTER AND COMPOSITION OF INKS, ETC. By WILLIAM E. HAGAN, Expert in Handwriting. New York: Banks & Brothers, 1894.

A LEGAL DOCUMENT OF BABYLONIA. By MORRIS JASTROW, Ph.D.
From the "Oriental Studies" of the Oriental Club of Philadelphia.
1894.

A STUDY OF THE DEGENERACY OF THE JAWS OF THE HUMAN RACE.
By EUGENE S. TALBOT, M.D., D.D.S., Chicago, Ill. Philadelphia :
The S. S. White Dental Mfg. Co., 1892.

**THE ETIOLOGY OF ORSBOUS DEFORMITIES OF THE HEAD, FACE, JAWS
AND TEETH.** By EUGENE S. TALBOT, M.D., D.D.S. Third Edition.
Philadelphia : The S. S. White Dental Mfg. Co.

**AN ILLUSTRATED DICTIONARY OF MEDICAL BIOLOGY AND ALLIED
SCIENCES.** By GEORGE M. GOULD, A.M., M.D. Boston : Little,
Brown & Co.

**RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CON-
STITUTIONS.** By CHARLES CHAUNCEY BINNEY, of the Philadelphia
Bar. Philadelphia : Kay & Brother, 1894.

THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM. By MAXIMUS
A. LESSER, A.M., LL.B., of the New York Bar. Rochester, N. Y. :
The Lawyers' Co-operative Publishing Co., 1894.

THE ART OF WINNING CASES; OR, MODERN ADVOCACY. By HENRY
HARDWICKER. New York : Banks & Bros., 1894.

THE LAW OF THE MASTER'S LIABILITY FOR INJURIES TO SERVANT.
By W. F. BAILLY. St. Paul, Minn. : West Publishing Co. ,

BOOK REVIEWS.

HANDBOOK OF CRIMINAL LAW. By WILLIAM T. CLARK, JR.
St. Paul, Minn.: West Publishing Co. 1894.

As the author states in his preface, this book is intended to contain not a mere digest of criminal law, arranged under proper titles, with just enough discussion of principles introduced to serve as a thread on which to hang the cases, after the fashion of so many modern text-books; but a concise and, he might well have added, clear statement of the general principles of that branch of jurisprudence, with enough cases added by way of illustration to fully elucidate the meaning, application, and extent of those principles. It is also confined principally to a statement of common law principles, and very wisely, for the lack of uniformity in legislation throughout the different States is perhaps nowhere so marked as in this department, and to fully define and explain the vast body of statutory crimes, to say nothing of pointing out their differences from the common law, would require more than one additional volume. These principles, then, are really the one essential thing that the judge and lawyer needs. Cases, apart from principles, are, ~~near~~ the West Publishing Company, chaff without wheat, and many a good case has been lost through the failure of the attorney to perceive the principles that underlay it. With this book in hand, even the most slothful practitioner can hardly excuse himself on this score in the future.

As a rule, the definitions and maxims, if the statements of principles may be so called, are clear, brief and to the point. But there are occasional instances which show that it is as hard to improve on Blackstone's definitions as on Solomon's proverbs. True, Mr. CLARK has fared better than the student who, on informing his professor that he thought Solomon might be excelled in that branch, was mildly requested to write a few; but still there are some inaccuracies to be found

here and there. For instance, he defines forgery as "the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice." A forged check, drawn on a bank in which the supposed drawer has funds, hardly imposes any liability upon him. It impairs his right to receive his deposit from the bank, but only by the most rigid technicality can any liability be held to rest upon him. So a forged will, which takes effect only on the death of the supposed testator, imposes no liability on him in any sense, or on any one concerned, except the executor or administrator. The old wording "to the prejudice of another man's right," is better.

The execution of the book is excellent. The system adopted of printing the statement of general principles at the head of each subject in heavy black type, is admirable, and one that might be adopted with advantage by others. The same might be said of the method of annotating, rather than digesting, already referred to. The book is a forerunner of a style of text-book writing that has become popular of late in England, but is as yet rarely seen here, where publishers still cling to old methods, in spite of changed conditions. In matter, method and execution, Mr. CLARK has produced a work that will prove of no little benefit to the profession.

R. D. S.

A TREATISE ON THE LAW OF MORTGAGES OF PERSONAL PROPERTY. By LEONARD A. JONES. Fourth Edition. Boston: Houghton, Mifflin & Co. 1894.

A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By LEONARD A. JONES. (Two volumes.) Fifth Edition. Boston: Houghton, Mifflin & Co. 1894.

Although this edition of JONES on Mortgages of Real Property represents an addition of several hundred pages to the text, and although the number of cases cited has been nearly doubled, the bulk of the work is not increased as much as might have been expected, as it is printed in type, which,

though admirably clear, is somewhat smaller than that used in previous editions. Then, too, some matter has been purposely omitted. Thus, the subject of Vendor's Liens has been relegated to the author's separate work on Liens. The chapters on Registration and Notice exhibit the greatest changes, as compared with former editions. The author has incorporated references to the National Reporter System, to the American Decisions, to the American Reports and to the American State Reports. So much for the new edition.

The original work is well known. It is one of those books which aims at giving within its covers all information in any way connected with mortgages. As an illustration of this, observe the chapter on Insurance, which treats fully of the insurable interests of mortgagor and mortgagee, of insurance by the mortgagor for the benefit of the mortgagee, of insurance by the mortgagee, and discusses cases which determine that a mortgage is not an alienation within the clause contained in ordinary policies. This incorporation of a discussion of insurance law into his treatise on mortgages is, perhaps, one of the features of the work which the author had in mind when he expressed it as his conviction that "the law of mortgages is a subject which cannot be treated altogether with reference to general principles." That the author's mode of dealing with the law has met with popular favor, however, is a matter of common knowledge—being evidenced, among other ways, by the appearance of this, the fifth edition.

The fourth edition of Mr. JONES's work on Chattel Mortgages represents an expenditure of time and labor in supplementing the earlier work at least co-extensive with that just referred to in the case of the work on mortgages of real property. This new edition quotes citations of two thousand additional cases, and it has also been found necessary to add to the text in order fairly to state the development of the law which has taken place since the last revision was made. It is always with satisfaction that the reviewer takes up the new edition of a text-book which contains evidences of a growth commensurate with the development of the law—finding, in other words, that he has before him a veritable "new edition"

and not merely a reprint made up to sell upon the basis of the reputation of the original. In this respect Mr. JONES's books are always satisfactory. His method of treatment is, of course, a popular method, by which is meant that he makes no serious effort to analyze tendencies, or, by a scientific application of the historical method to gather from past and present development suggestions as to future growth. But the lines originally laid down are faithfully followed, and the work is brought down to date with scrupulous care.

G. W. P.

THE BENCH AND BAR OF NEW HAMPSHIRE, including Biographical Notes of Deceased Judges of the Highest Court and Lawyers of the Province and State and a List of Names of those now living. By CHARLES H. BELL. Boston and New York: Houghton, Mifflin & Co. The Riverside Press, Cambridge. 1894.

In this book we gain an accurate and well-stated digest of those lawyers and judges who established the reputation of the New Hampshire Bar as it was some years ago. Of course among the list are many whose reputation has not reached beyond the limits of the State and, perhaps, have hardly been known as lawyers within its limits. But **ATHERTON, BARTLETT, THORNTON, BELL, MASON, RICHARDSON, WEBSTER** and **WOODBURY** are names which, in their day and generation, had a much wider significance and were borne by men who throughout New England at least were esteemed good lawyers, wise judges and able men of affairs.

The biographies contain many amusing incidents of the personal peculiarities of the subjects to which they refer, and among the New England States the Bar of New Hampshire has stood pre-eminent in that interesting respect. An equal freedom from conventionalities has manifested itself on the Bench, and if current report be believed the present Chief Justice surpasses all his associates and predecessors in that unenviable regard.

Boldness and independence of mind in giving utterance to

the law upon the Bench, we cannot have in too great degree and the State is to be congratulated that so many of its judges have possessed these characteristics. The decision of *Britton v. Turner*, in Vol. 6 N. H. Reports, at page 481, on the entirety of contracts indicates these qualities and is greatly to be commended.

The biographies are interesting also as marking the change which has manifested itself in the profession within the last thirty years. In the earlier days the important questions of law arising from the necessity of adopting the common law to the affairs of our new country offered a field in which the ablest lawyers of New Hampshire labored faithfully and well.

As a result the decisions of New Hampshire courts are a high authority upon points of common law practice and procedure and upon the fundamental principles of the law of contracts, torts, equity and real estate.

But with the establishment of these fundamental principles and their crystallization into decisions repeatedly sustained, the profession has ceased to find within the State a field which could develop and occupy the best abilities of its members.

For the main occupation of the lawyer to-day is the protection of property rights already established. The great questions of public rights and to an extensive degree also of private rights have been passed upon and defined in all the States. Questions as to commercial rights and powers are in the main the sources of activity upon which the lawyer in any State can depend for occupation. And in the smaller States or one where the growth of business has been comparatively small or confined within narrow channels, there have not arisen new questions of property rights or questions upon which depended large financial interests.

The only exceptions have been those of railway or manufacturing corporation law, and there the precedents in other States have been clear and well established. As a consequence young men of promise have not been attracted into the profession from other States, but on the contrary young men of promise in the State have been attracted out of it, and so as a further consequence the decisions of its courts and the

arguments of its lawyers are not of the importance or interest that they have been.

But as portraits of men who from small beginnings and with few advantages worked themselves up into commanding position among their cotemporaries, they are interesting, and it cannot be gainsaid that the lawyers whose labors are here described were men who fearlessly, faithfully and with signal ability discharged the duties which they were called on to perform.

The printing, paper and binding are unexceptionable, as is usually the case with work from the Riverside Press.

Manchester, N. H.

G. W.

THE ANNUAL OF THE LAW OF REAL PROPERTY. Edited by
TILGHMAN E. BALLARD and EMERSON E. BALLARD. Vol. 2.
Crawfordsville, Ind.: The Ballard Publishing Co. 1893.

Legal literature has reached the point where compendiums of particular branches of the law, if well done, have an assured place. The second volume of the Messrs. BALLARD's work brings the law of Real Property down to the present year continuing from Volume I begun a year earlier. As we said, in reviewing the first volume, the only true test of the success of such a production is the demand for it, and there is every evidence that this one has already met with that success.

Volume II contains a smaller number of cases reported in full than the previous volume. It is to our mind a mistake to insert the full report of *any* cases. The real use of a work of this kind is to direct the practitioner to the authorities for which he is in search, not to reproduce those authorities. It is upon the reports themselves that a lawyer must ultimately rely. The province of compendiums is to guide him by a short cut to his goal. The Ballard Annual does this far better than any mere digest can do, for on account of its elaborate arrangement and index, and especially the fact that something more than dry and insufficient syllabi are given, a far more correct estimate is given of the importance of the original cases, and whether or not they are applicable to the point being studied.

W. S. E.

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SEPTEMBER, 1894.

THE LEGAL SIDE OF THE STRIKE QUESTION.

By ARDEMUS STEWART, Esq.

The strike is one of the most prominent elements in the problem of the relation of capital to labor—especially prominent in view of the occurrences of the past few months—and therefore one of the most important phenomena of our present social condition. A state of affairs that permits a few men to dictate whether or not the business of a whole section of country shall continue or cease, and that renders a presumably intelligent body of men the slaves of the dictators, is surely of no ordinary consequence in a theoretically free country, to say nothing of the disastrous results to the individual inhabitants of the region affected. And when to this is added the wanton trampling on the rights of others, the reckless destruction of property, and the criminal disregard and violation of the sacredness of human life, that have characterized the more recent strikes in a higher degree than any preceding, it is clear that the problem demands most earnest attention from every patriotic citizen, and that our national existence depends in no small measure upon its satisfactory solution. As a broad question, this belongs to the domain of the student of political economy; but in view of the fact that the rampant growth of the evil has been due in large degree to a misapprehension of its legal bearings, as well as to criminal negligence on the

part of the constituted authorities, a survey of the legal questions involved would seem to be both timely and profitable.

In its simplest form, a strike is the mere refusal of an employé, or rather, of a body of employés, to work for the employer for whom they have contracted to work. In that case there is nothing criminal. Every man has a right to work for whom he pleases, and to refuse to work if he pleases; subject, however, to damages for breach of contract. The morality of a strike, however, depends entirely upon its cause. If for any breach of contract on the part of the employer, or because the contract is an unfair one, it is perfectly justifiable; but if on the other hand, the contract was fair, and the employer has performed his part of it in good faith, a breach by the laborer is equally unjustifiable. For instance, if the employer has taken advantage of the necessity of the employé to hire him at a price too low to afford him a fair subsistence, or if he refuse to pay him wages due, a strike with the object of forcing him to fair terms, or to pay those wages, would be proper. But if the terms of employment are fair, and the wages are duly paid, a strike for the purpose of obtaining higher wages, less hours of work, the employment of only a certain class of laborers, and the like, is wholly inexcusable, even if not within any legal prohibition.

But there is another phase of the question. A mere strike is not the most efficient means of bringing an employer to terms. He can, as a general rule, hire other laborers, and go on with little or no inconvenience. Accordingly, what is known as the boycott has been devised, which consists in preventing the use or sale of the goods manufactured or produced by the employer; and is frequently enforced by causing a strike among the employés of those who use or buy his goods. This carries the matter a step farther; and is a naked interference with the personal rights of the employers, without the shadow of an excuse on the part of the strikers, except that the end justifies the means. This, in so far as those concerned may be considered as conspiring together, is open to the animadversion of the law. Such acts

are not, as was very forcibly said by Justice Beach of New York, in a recent case, as yet unreported, "indicative of strife between capital and labor, but of one between order and disorder, or between right and wrong. They impair and seriously affect the constitutional privilege to pursue lawful business without hindrance or molestation, and that privilege must be fully protected and firmly upheld."

Finally, there is another form of strike that has not yet had time to reach a complete development and show its full possibilities; but fortunately for the welfare of the nation, it probably never will until the insane portion of the population outnumbers the sane. This is the so-called "sympathetic" strike, which appears to consist in a cessation of work, for no other reason than that thereby the interests of the people at large may be so imperilled that they will rise on their dignity and compel some employer, between whom and his employ  s a difference exists, to accede to the demands of the latter. It supposes no grievance on the part of the striker, no dispute between him and his employer; but is utterly causeless and irrational. It is difficult to bring it within the purview of the law, as it is so senseless a proceeding as to have never entered the mind of legislator or judge until the labor leaders sprung it upon their attention; but its instigators, if not the strikers themselves, are guilty of criminal conspiracy.

The recent Chicago strike passed through all these stages, and its history shows very clearly their nature and operation. It began with a strike pure and simple. Some employ  s of the Pullman Car Company were not satisfied with their wages, and stopped work. Then, in order to render that strike successful, the leaders of the American Railway Union endeavored to prevent the use of Pullman cars, by ordering its members to strike on all roads using them. That was a boycott. Then, that not having the desired effect, the members of the union on roads not using Pullman cars were ordered to strike. That was a sympathetic strike. Then all the labor unions in Chicago were ordered to strike, under the silly impression that the people would be so injured

thereby that they would demand a settlement of all these other strikes. That was a sympathetic strike in the second degree of anti-climax, in purpose and results. And then, in one last pyrotechnic fizzle, it was attempted to order a general strike of all labor unions throughout the country, which would have been the superlative degree of folly and wickedness. But by that time the moon was past the full, and Jack being unable to find the priest all shaven and shorn, his pasteboard house came tumbling about his ears.

So much for the general nature of strikes. It is evident from what has been already said that the striker exposes himself, under varying conditions, to both a civil and a criminal liability. The civil liability is two-fold: in the first place, to the master for breach of contract; and in the second place, to any third person who may be injured in person or property by his refusal to perform that contract.

For the breach of contract he is liable in damages to the extent of the injury directly due to the breach. That, of course, depends on the nature of the contract, and the facts of the case. If the employer has already broken his part of the contract, as by a reduction of wages, increase of hours, or any other change in the terms of employment, the contract is at an end, and there is no breach, and consequently no damages. But if the breach is all on the side of the employé the only question is as to the amount of damage. Here the law wholly fails to afford adequate relief. In a strike the damage is due not so much to the individual refusal to work, as to the concerted action of the strikers. The place of one man could be easily filled; but the places of a whole body of employes, especially if skilled workmen, are not so quickly supplied. In consequence of this, contracts may be forfeited, and the money already expended in wages and the purchase of material lost, machinery and furnaces rendered useless, and many other injuries and losses caused. Yet, in such a case, the body of strikers cannot be held liable jointly, nor can each man be held liable for the damage due to the action of all. All for which he can be held responsible is for the loss caused by his refusal alone. That, of course, if susceptible of proof

at all, is very slight compared with the actual damage suffered, and is not worth the expense of collection by suit; while in many, if not the great majority of cases, the laborers could not be forced to pay, even if a judgment were recovered against them. And even if the damages recoverable were in some degree responsive, and the judgments available, the multiplicity of suits rendered necessary in many cases would be in the highest degree oppressive and vexatious, both to the employer and to the courts.

Furthermore, there are many items of damage that it is wholly impossible to estimate, arising from the loss of prospective business and profits, the injury done to third persons who are dependent upon the employer or his products, and the like. One very obvious instance is that of a strike of a body of workmen in a large establishment, the product of whose labor is necessary to keep others employed, as is the case in the present strike at Fall River. When they cease work, the others, willing or unwilling, are forced to do the same. If the butchers in a packing establishment strike, as they did in Chicago in July, all the packers, shippers, teamsters, and so on, must stop likewise. And the same is true of every large manufacturing establishment where the departments of labor are specialized.

Even a better instance of such damage is afforded by a railroad strike. In such case the first element of damage is the injury that the stoppage of work may do to the works and apparatus of the company; then the loss from perishable freight, and from failure to deliver freight and passengers at their destination in time, all of which are capable of calculation. But then comes the loss on the business which would have been done during the time of idleness, which the law cannot estimate; the loss to expecting passengers unable to travel; the loss to shippers unable to send their goods; the loss to tradesmen unable to secure needed merchandise; the losses consequent on the general paralysis of business in the region supplied by the road; the loss to creditors unable to collect debts on account of the inability of others to pay, due to the stoppage of that trade; and so on through endless ramifica-

tions, until it is safe to say that there is not a person in the whole district but suffers loss, directly or indirectly.

For some of these losses there are remedies; but a dead loss always falls somewhere. The owner of freight destroyed or detained has his remedy against the railroad; but the railroad has no remedy except that against the striker. The railroad can recover damages for property destroyed from the county in many cases; but the county has no remedy except against the striker. In every case therefore the bulk of the injury suffered is without remedy, and the law proves wholly inadequate to meet the mischief.

There would seem to be no good reason why in some cases, at least, the third person injured should not have a remedy, also theoretical, but practically useless, against the striker, not for breach of contract, but for a tort committed in that breach, by the misfeasance or nonfeasance of duty. It would appear to be as clearly an act of negligence to leave perishable freight sidetracked, as for a servant to drive his master's carriage carelessly along the street; and while the master is liable in each case for the tort of the servant, the servant is liable individually in the latter case, and should be so in the former. Such a liability is enforceable against a boycotter, for his tortious inference with the business of the person boycotted: *Steamship Co. v. McKenna*, 30 Fed. Rep. 48; *Moore v. Bricklayers' Union*, 23 Wkly Law Bull. 48; *Carew v. Rutherford*, 106 Mass. 1.

The criminal liability of the striker is capable of more efficient enforcement. It also has a twofold aspect, the one growing out of the act of striking, the other out of the acts done in pursuance of the strike. The latter, as a general rule, forces itself much more prominently before the public.

As has been said, the theoretical strike is a harmless affair, whether morally justifiable or not, being nothing but a cessation of work; but practically it is far different. There is no such thing as a peaceable strike. Such a strike could not succeed. Mere supineness on the part of the employes would inevitably result, sooner or later, in their places being filled with new employes, and the business of the employer being

successfully prosecuted, while they themselves would be permanently thrown out of work. Accordingly, it becomes an absolute requisite of success that new employ  s be kept away, by force if necessary, and this, if peaceably done, is none the less a violation of the right of the employer to employ whom he pleases. If done by violence, as is usual, it is not only a violation of the rights of the employer, but of the intending employ  , as well as a violation of positive law, resulting at times even in murder. The proofs of this are to be seen in the papers almost daily. We read of wanton attacks made upon men whose only offence was that they had taken the places of strikers, of dynamite placed under the houses in which they boarded, of shots fired through their windows, of poison placed in their food. Again, we read of the property of the employers being destroyed in sheer malice, by fire or other instrument of destruction, of reckless defiance of legal authority, of talk at least of open rebellion. At times, as at Homestead, the rebellion is all but a fact. Assault, riot, arson, murder, treason—this is a pretty list of offences to compare with the impudent claim, made at every strike, that the strikers are acting only on their legal rights.

It is no excuse, as has been argued and refuted time and again, to urge that these crimes are committed, not by the strikers themselves, but by the criminal classes, who take the opportunity of indulging their evil propensities. This is no doubt true to some extent, but not by any means to the extent claimed, as witness the Homestead poisoning case, which is the most noted example of modern times. Even if it were true, the strikers would not stand acquitted of blame, for it is their action that incites and encourages the others; and they stand rather in the light of accessories than otherwise, as there are but few recorded instances in which they have interfered to check criminal excesses. Both morally and legally, they are responsible for most of the crimes thus committed.

The strike is itself criminal in many cases. If it have no valid reason, but is merely an attempt to coerce the employer

to accede to the demands of his employé by leaving his service in a body, it is an indictable conspiracy at common law, equally with an attempt to induce a workman to leave his master's employ: *R. v. Ferguson*, 2 Starkie, 489; *R. v. Bykerdike*, 1 M. & Rob. 179; *R. v. Duffield*, 5 Cox C. C. 404; *R. v. Rowlands*, 5 Cox C. C. 437, 466; S. C., 17 Q. B. 671; *R. v. Brown*, 12 Cox C. C. 316; *State v. Glidden*, 55 Conn. 46; S. C., 8 Atl. Rep. 890; *State v. Donaldson*, 32 N. J. L. 151; *Pco. v. Fisher*, 14 Wend. 9; *State v. Stewart*, 59 Vt. 273; S. C., 9 Atl. Rep. 559; *Crump v. Com.*, 84 Va. 927; S. C., 6 S. E. Rep. 620. Vermont has adopted this rule by statute, R. L. Vt. §§ 4226, 4227, but Pennsylvania and New Jersey have abandoned it in favor of a weaker doctrine, by permitting the use of peaceable persuasion to induce others to quit service: Acts Pa. 1872, June 14, P. L. 1175, and 1876, April 20, P. L. 45; Rev. Sup. N. J. p. 774. § 30, wholly overlooking the fact that in so doing they deprive the employer of his best protection; that it is not the manner of the persuasion, but the persuasion itself, that makes the act criminal; that the wrongfulness of the persuasion depends not upon its nature between the persuader and employé, but upon its results as affecting the rights of the employer; and that the legalizing of a crime is a dangerous precedent.

Yet even this criminal remedy has proved inefficient, owing, as in the case of the civil remedy, to the expense and difficulty of prosecuting it fully. It would of course be impossible to prosecute criminal actions at one and the same time, against thousands of persons scattered over a large territory, all of whom are ready to defend at any length, without great cost and harassing of the courts. The very idea of punishing all the offenders is therefore preposterous; and the punishment of a select few only tends, in many instances, to encourage the rest by their impunity. Even if the leaders are convicted, there are always plenty of others willing, for the sake of a little brief authority, to emulate their prowess and take their chances. Add to this the fact that the union movement is so widespread that it is almost impossible to secure a jury without union sympathies, and it will be clear that the criminal remedy,

at least as at present existing, fails, equally with the civil, to afford adequate protection and redress.

This state of facts affords good ground for the interference of equity; and of late years the tendency has been to invoke its assistance. That has been granted on the grounds previously mentioned as negating the efficiency of the legal remedies, the inadequacy of the remedy on the contract or tort, and the prevention of multiplicity of suits: See *Blindell v. Hagan*, 54 Fed. Rep. 40; *S. C. aff.*, 56 Fed. Rep. 696. So, where strikers enter the premises of the employer, and interfere with the men at work there, their acts will be enjoined as a continuing trespass and irreparable injury: *N. Y., L. E. & W. R. R. v. Wenger*, 17 Wkly. Law Bull. 306; *Coeur D'Alene Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 260. The mere fact that the act sought to be enjoined is also criminal, will not oust the jurisdiction of equity. It is true that a crime, as such, will not be enjoined; but the reason of that is that the court will not suppose that a crime is intended, and therefore cannot take cognizance of the act until it is committed; but that rule cannot be extended to a case where the continuance or repetition of an act, criminal in one respect, leaves no reasonable doubt as to the intention to commit it, such as the maintenance of a public nuisance, the commission of a continuing trespass, the keeping of an unlicensed saloon, and the like. The injunction in such a case issues to remedy the private wrong, not the public offence; and has nothing to do with the latter. It rests upon the principle that permits a suit at law to be maintained concurrently with a criminal prosecution, and represents the civil remedy for the criminal act. It will accordingly lie in any case where the civil remedy would lie, when that is inadequate, and may be either negative or mandatory, as the circumstances of the case require; for when the *status quo* would inflict irreparable injury, a mandatory injunction will issue to change that status: *Beadel v. Perry*, 3 L. R. Eq. 465; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. N. Y. & N. J. Telephone Co.*, 42 N. J. Eq. 141; *S. C.*, 7 Atl. Rep. 851. The remedy by injunction has the further advantage that it can be enforced by summary process

for contempt: *Lake Erie & W. R. R. Co. v. Bailey*, 61 Fed. Rep. 495.

For some reason, probably political, this remedy does not seem to have been invoked in the State courts to any extent, at least directly against the strikers, though interference by third parties with the business of an employer by means of the boycott and kindred annoyances has been restrained: *Sherry v. Perkins*, 147 Mass. 212; S. C., 17 N. E. Rep. 307. It has been found more convenient, by the railroads at least, against which most large strikes are directed, to institute such proceedings in the Federal courts, under the Interstate Commerce Acts, especially that of July 2, 1890: 26 U. S. Stat. at Large, c. 647, p. 209. Since the passage of that act, every combination in restraint of trade or commerce among the several States is illegal; and a strike or a boycott can no longer be effective, as they necessarily affect interstate commerce: *Waterhouse v. Comer*, 55 Fed. Rep. 149. Any combination of men to secure or compel the employment of none but union men becomes a combination in restraint of interstate commerce, within the meaning of the statute, when, in order to gain its ends, it seeks to enforce, and does enforce, by violence and intimidation, a discontinuance of labor in all departments of business, including the transportation of goods from State to State, and to and from foreign nations; and an injunction will be granted to restrain them from so doing: *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994.

This reasoning applies with more force to the case of a common carrier, such as a railroad, than to any other; and there is hardly an instance in which the Federal courts have refused to grant the relief asked, their tendency being to enlarge the remedy rather than curtail it. The first important case was that of the strike on the Toledo and Ann Arbor road in 1892. The Brotherhood of Locomotive Engineers had struck for some reason of dissatisfaction, and it was attempted to make the strike effectual by boycotting the road, that is, compelling other roads to refuse to receive and handle its cars under threat of extending the strike to them. The

Ann Arbor road thereupon filed a bill against its connecting lines, and their employes, praying that the latter might be restrained from refusing to handle its cars, which was accordingly granted: *Toledo, A. A. & N. M. Ry. v. Penna. Co.*, 54 Fed. Rep. 746. The court went a step farther, and, being asked for an injunction against Mr. Arthur, the Chief of the Brotherhood, to restrain him from issuing, promulgating or continuing in force any order of the Brotherhood requiring any employes of any defendant railroad company to refuse to handle and deliver any cars of freight in course of transportation from one State to another, etc., but finding that order already issued, granted a mandatory injunction to compel him to rescind it: *Toledo, A. A. & N. M. Ry. Co. v. Penna. Co.*, 54 Fed. Rep. 730.

In the Chicago strike, however, a form of injunction, based on this ground of interference with interstate commerce, was adopted generally throughout the region affected, which has become famous as the "omnibus injunction." Its essential parts were as follows: "Eugene V. Debs, etc., and all other persons combining and conspiring with them, and all other persons whomsoever, are enjoined absolutely to refrain from interfering with or stopping any of the business of any of the railroads in Chicago engaged as carriers of passengers and freight between States, and from interfering with mail, express, or other trains, whether freight or passenger, engaged in interstate commerce, or destroying the property of any of the railroads; from entering their grounds for the purpose of stopping trains or interfering with property . . .; from compelling or inducing by threats, or persuasion, or violence, any of the employes of said roads to refuse or fail to perform any of their duties as employes of such road in connection with interstate commerce of such railroad, or the carrying of mail, passengers, or freight, or attempting to induce by threats or intimidation any of the employes of such roads engaged in interstate business or operation of mail trains, to leave the service of such roads, or preventing any persons from entering the service of such roads."

This leaves little more to be desired in its special province,

being, as the district attorney said it was intended to be, a veritable dragnet, involving in its meshes all possible offenders against the law. It has, however, this fault in common with all the other remedies thus far mentioned, that it is remedial only. It does not operate to prevent a strike, but to hinder the commission of illegal acts in furtherance of that strike; and is, therefore, in so far ineffective to cure the evil. But one bold effort in that direction has been made, which succeeded in bringing down upon its author the woes of a congressional investigation. Judge Jenkins, in *Farmers' Loan and Trust Co. v. N. Pac. Ry. Co.*, 60 Fed. Rep. 803, issued a remarkable injunction, in effect forbidding the employes of that road to carry out a threat to strike and leave its service. The injunction restrained them "from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property or to prevent or hinder the operation of said railroad." This was vigorously animadverted on from several quarters, and the investigating committee, while very considerably exonerating the judge from all accusations of unfairness and abuse of power, recommended that legislation be adopted to prevent a recurrence of such action, which report was adopted by the Judiciary Committee of the House.

All the arguments against the exercise of such a power rest on a fancied arbitrary right of an employé to work or not for whom he pleases. That right only exists at birth, if ever; for in human society there is no such thing as an absolute unqualified right to anything. All rights are relative. A man has a right to enjoy his personal liberty, or his personal property; but if he infringes the rights of his fellows in these respects, his rights are *pro tanto* gone, and revive again only on the satisfaction of the demands made upon him for that violation. So in this case, the right of a man to quit work must of necessity be governed by the nature of his employment and the rights of third persons. Granting that the

employer's only right is to recover for breach of the contract, it does not follow that the rights of third persons who have no remedy are to be recklessly jeopardized. Judge Jenkins has very forcibly stated this side of the question. "One has not the right arbitrarily to quit service without regard to the necessities of that service. His right of abandonment is limited by the assumption of that service, and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation, could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of his patient. It would be monstrous if a body of surgeons, in aid of such demand, could lawfully combine and conspire to withhold their services. . . . It would be intolerable if counsel were permitted to demand larger compensation, and to enforce his demand by immediate abandonment of his duty in the midst of a trial. It would be monstrous if the bar of a court could combine and conspire in aid of such extortion by one of its members, and refuse their service. I take it that in such case, if the judge of the court had proper appreciation of the duties and functions of his office, that court, for a time, would be without a bar, and the jail would be filled with lawyers. It cannot be conceded that an individual has the legal right to abandon service whenever he may please. His right to leave is dependent upon duty, and his duty is dictated and measured by the exigency of the situation." 60 Fed. Rep., p. 812.

This terse, vigorous argument leaves little more to be said. It may be added, however, that conceding all that is claimed on the other side, the injunction granted by the judge does not violate any principle of law. It may be taken as true that a contract of service cannot be specifically enforced, either directly or indirectly, though that is an arbitrary rule of equity, and could be rescinded at will: *Stocker v. Brockelbank*, 3 MacN. & G. 250; *Johnson v. Railroad*, 3 DeG. M. & G. 914; *Lumley v. Wagner*, 1 DeG. M. & G. 604; but the injunction granted by Judge Jenkins did not enforce service. All that it enjoined was the conspiracy to quit, leaving the right to quit as individuals untouched. In short, he simply

followed out the principles on which the prior decisions were founded to their logical conclusion, and enjoined the illegal, injurious action threatened, while not in the least interfering with the legal rights of the employes. The precedent is an admirable one, and if followed would go far to simplify the question of strikes. It is to be hoped Congress will adopt it, rather than the measures suggested by the report of the Judiciary Committee.

It is the more to be regretted that that body adopted such a course, as it is in line with the lax tendency noticeable in such matters of late years, and which led to the passing of the statutes of Pennsylvania and New Jersey already cited. Any encouragement of crime is sure to bring about a recrudescence of criminality; and this has been true in this case. The Pennsylvania statutes were followed by the Pittsburgh riots of 1877, the Reading strike and the Homestead strike; the legislation adopted by Congress after that last outbreak, forbidding the movement of armed bodies of men from one state to another, was followed by the New York strike and the coal strike in the bituminous coal regions; while the report of the Judiciary Committee on the Jenkins injunction was followed so closely by the Debs rebellion that its heels must have suffered considerably. The only effect of toleration of crime is to encourage it, and if that is not now clear with respect to strike legislation it never will be. The need is of repressive legislation, the more stringent the better, something that will teach the lawbreakers that they must respect the rights of others; and above all, measures that will render it impossible for any unprincipled, irresponsible demagogue to hold in his hands the welfare of a whole region.

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ROBINSON v. FLOYD ET AL.¹ SUPREME COURT OF PENNSYLVANIA—

Partners of a banking firm who sell their interest and withdraw from the firm cannot by a mere publication of notice of such withdrawal in a newspaper, relieve themselves from liability for subsequent deposits by one who was a regular depositor for many years prior to such withdrawal; but a partner who gave actual personal notice to such depositor of his withdrawal, within three months thereafter, is not liable for such subsequent indebtedness.

NECESSITY FOR NOTICE UPON THE DISSOLUTION OF A PARTNERSHIP.

When a number of persons join themselves together for the purpose of carrying on any business or undertaking any kind of enterprise, each one thereby delegates to the other an authority, express or implied, to bind the members composing the partnership by an act or contract coming within the scope of the business for which the firm might be formed. Instances sometimes, if not frequently, occur where the authority of one member of a firm to bind the others will continue after the actual dissolution of the firm as between the parties themselves. But as to third persons and those dealing with the firm as creditors, the same continues to exist for all purposes until notice of the dissolution, actual or constructive, as the case may require, is given thereof. This wholesome rule of the law is founded on the soundest reason, and fortified by simple and natural justice. It is akin to the rule that holds the master liable for goods purchased by his servant

¹ Reported in 28 Atl. Rep. 258.

whom he sends to make purchases in the master's name, and where the servant, though his authority to make the purchases be withdrawn by the master, continues to buy of the dealer as before, the master not notifying the dealer that the servant's authority to buy goods on his credit is at an end. In short, the authority of the servant in the eye of the law is presumed to continue until notice to the contrary is given by the master. The rule is likewise grounded on the doctrine of equitable estoppel, as "where one party has by his representations or his conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." The servant is the agent of the master to buy goods on his credit. Good faith and fair dealing require the master to notify his dealer when that relation is ended. And so one partner is the agent of the others to bind them in all legitimate firm transactions; and when that authority is ended by the private agreement of the partners themselves, creditors of the firm and the public generally have a right to expect that the proper notice of the dissolution will be given and rely on this with assurance. Any other rule would open wide the flood-gates of fraud and facilitate all sorts of dishonesty and imposition.

There are two kinds of notice usually given when a firm retires from business and is succeeded by another, or is dissolved by the withdrawal of one or more of its members. To the public in general, it is usually sufficient to relieve the retiring member from liability for debts contracted in the name of the firm by the remaining partner or partners if notice of the dissolution be published in some newspaper in the town, vicinity or county where the business was carried on: *Graves v. Gilbert*, 7 Cow. 704; *Lansing v. Gaine*, 2 Johns. 304; *Ketchum v. Clark*, 6 Johns. 144; *Wilkinson v. Bank of Pa.*, 4 Whart. (Pa.) 482; *Reilly v. Smith*, 16 La. An. 31; *Wheelock v. McGovern*, 28 Iowa, 533; *Simonds v. Strong*, 24 Vt. 642; *Mitchum v. Bank of Ky.*, 9 Dana, 166; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118; *Graves v. Merry*, 6 Cow. 701; *Austin*

v. Holland, 57 N. Y. 571; *Amidown v. Osgood*, 24 Vt. 278; *Haynes v. Carter*, 12 Heisk. (Tenn.) 7; *Bristol v. Sprague*, 8 Wend. 423; *Johnson v. Tolten*, 3 Cal. 343; *Meyer v. Khron*, 114 Ill. 574; *Moline Wagon Co. v. Rummel*, 12 Fed. Rep. 658. On the other hand, all who have had dealings with the firm prior to the dissolution are entitled to actual notice: *McLemore v. Rankin Mfg. Co.*, 8 So. Rep. 845; *Clement v. Clement*, 69 Wis. 599; *Morrill v. Bissell*, 58 N. W. Rep. 324; *Hall v. Heck*, 92 Mich. 458; *Moline Wagon Co. v. Rummel*, 12 Fed. Rep. 658; *Meyer v. Khron*, 114 Ill. 574; *Shamburg v. Abbott*, 112 Pa. 6; *Cogswell v. Davis*, 65 Wis. 191; *Gilchrist v. Brand*, 58 Wis. 184; *Elkington v. Booth*, 143 Mass. 479; *Potts v. Taylor*, 140 Pa. 601; *Speer v. Bishop*, 24 Ohio. 598; *Wilkinson v. Bank of Pa.*, 4 Whart. (Pa.) 482; *Reilly v. Smith*, 16 La. An. 31; *Simonds v. Strong*, 24 Vt. 642; *Mitchum v. Bank of Ky.*, 9 Dana (Ky.), 166; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118; *Marsh, Denman & Co. v. Dossan*, 19 La. An. 9; *Pope & West v. Risley*, 23 Mo. 185; *Lyon v. Johnson*, 28 Conn. 1; *Merrett v. Williams*, 17 Kan. 287; *Stewart v. Sonnebarn*, 49 Ala. 178; *Zollar v. Jarvin*, 47 N. H. 324; *Graves v. Merry*, 6 Cowen (N. Y.), 701; *Clapp v. Rogers*, 12 N. Y. 283; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Wardwell v. Haight*, 2 Barb. 549; *Vernon v. Manhattan Co.*, 22 Wend. 183; *Prentiss v. Sinclair*, 5 Vt. 149; *Adam v. Holtgrove*, 85 Ill. 470; *Dickinson v. Dickinson*, 25 Gratt. 321; *Austin v. Holland*, 57 N. Y. 571; *Nott v. Douming*, 6 La. 680; *Haynes v. Carter*, 12 Heisk. (Tenn.) 7; *Johnson v. Tolten*, 3 Cal. 343; *Brown v. Foster*, 19 S. E. Rep. 299; *Robinson v. Floyd*, 28 Atl. Rep. 258; *Rosenbaum v. Horton*, 57 N. W. Rep. 609; *Bristol v. Sprague*, 8 Wend. 423.

The retiring partner is charged with notice of the fact that the remaining partners can bind him by contracts made in the name of the old firm, and it is his duty under the law to diligently search out all the old customers of the firm at his peril, and to see that they have actual notice of the dissolution: *Amidown v. Osgood*, 24 Vt. 278. And this is necessary whether the name of the retiring partner appear in the style of the firm or not: *McLemore v. Rankin Mfg. Co.*, 68 Miss. 196.

The Supreme Court of Louisiana lays down the recognized rule very correctly as follows: "The general rule of law is that, as to persons who have not dealt with the firm, notice in a public newspaper of the city or county where the partnership business is carried on will be sufficient; but as to persons who have been previously in the habit of dealing with the firm it is requisite that actual notice should be brought home to the creditor, or, at least, that the credit should be given under circumstances from which actual notice may be inferred:" *Reilly v. Smith*, 16 La. An. 31.

It may be necessary to inquire sometimes what is sufficient notice. The case of *Haynes v. Carter*, 12 Heisk. 7 was an action to charge one W. L. Carter, Sr., with a debt contracted in the name of a firm of which he had been a member, and which was made after his withdrawal. The creditors seeking to charge him had been previous dealers with the firm, the style of which was Carter & Upton. In the course of events, the senior Carter, who seems to have been the responsible member of the firm, withdrew and was succeeded by his son, W. L. Carter, Jr. The style of the firm was not changed. The dissolution was advertised in a local newspaper, a copy of which, containing the notice marked in red ink, was sent to the creditors by Carter, Jr. It was shown that this notice was not received, and it was held that Carter, Sr., was liable. It was held, further, that the sending of the paper was evidence tending to show notice, but was not, of itself, sufficient when it was shown that it was not received. It was also held that the sending a notice of dissolution properly directed would raise a presumption of notice, as letters sent by post are presumed to reach their destination; but that is a presumption of fact only, and not of law, and might be repelled by proof. Nor is it notice to a previous dealer that he take the paper in which the notice is contained unless he see it, or actual knowledge of it be brought home to him: *Lyon v. Johnson*, 28 Conn. 1. The law does not require that every notice or advertisement contained in a newspaper be read; and even if a creditor take a paper in which a notice of dissolution is contained, and actually receive the very number

containing the same, this will not be notice. It is probable, and perhaps nothing is more common, than for persons to take newspapers without reading every advertisement they contain, and it would be going entirely beyond the pale of reason to visit a person with the knowledge of the contents of all notices contained in a paper from day to day: *Wilkinson v. Bank of Pa.*, 4 Whart. (Pa.) 482; *Austin v. Holland*, 69 N. Y. 571; *Reilly v. Smith*, 16 La. An. 31; *Meyer v. Khron*, 114 Ill. 574. And a letter stating the dissolution, which was not returned from the dead letter office, though properly mailed and directed, is not sufficient notice without other evidence of its receipt. The rule that letters properly addressed and mailed are evidence of notice is restricted to commercial paper, and does not apply in case of the dissolution of a partnership: *Kenney v. Altwater*, 77 Pa. St. 34.

It is not necessary, however, that the creditor have actual notice of the dissolution of a copartnership. He may have a knowledge of such facts and circumstances as are inconsistent with anything less than notice. Or, if we have information of facts, which if diligently followed up with inquiry, would lead to a knowledge of the fact of dissolution, he shall be deemed in law to have actual knowledge of it. He cannot be wilfully blind when facts that imply the necessary information are brought to his knowledge. The law requires the retiring partner to give the necessary notice; none the less, however, does it require the creditor to use proper diligence and the means of information when he has that means: *Prentiss v. Sinclair*, 5 Vt. 149; *Pope v. Risely*, 23 Mo. 185; *Stewart v. Sonnebarn*, 49 Ala. 178; *Rimel v. Hays*, 83 Mo. 200; *Johanson v. Tolten*, 3 Cal. 343.

But it is not every kind of information that a creditor is bound to pursue in order to hold the retiring partner; for instance, every one is charged with knowledge of the contents of the public records of the courts, the records of deeds and mortgages, etc., but the recording of a mortgage executed by the remaining member of the firm to the retiring partner, is not notice to the world nor to the creditor that there has been a dissolution, and this though the property embraced in

the mortgage be goods like those of the firm, and actual knowledge of the existence of such a mortgage be brought home to the creditor, does not charge him with notice, nor, as matter of law, put him upon inquiry. The fact that the creditor may have had the means of knowledge which, if followed up diligently, would have revealed the dissolution, yet this will not charge him unless the circumstances were such as to put him upon inquiry. If any question should arise involving the title to the property mortgaged, the mortgage being properly registered, would be constructive and conclusive notice to purchasers because it would be their duty to look to the registry for conveyances affecting the property. No such duty, however, rests upon a creditor of a firm to learn of the dissolution thereof. The law does not require that the retirement of a partner should be matter of record where deeds and mortgages should be registered, and of course there can be no requirement that a creditor look for a record to ascertain of a dissolution. It must be the duty of the creditor to follow up the knowledge that puts him upon inquiry before he can be charged with knowledge of what a due inquiry would lead up to: *Zollar v. Jarvin*, 47 N. H. 324.

If the creditor have notice of the dissolution, whether directly from the retiring partner or from third persons or from having seen the same advertised, or if he have the information from any source or in any mode whatsoever. It is sufficient if he have it. When this is the case all is accomplished that could be effected by serving actual notice upon him, or by the most diligent advertising, and this is true, though the retiring partner be negligent in not giving notice, yet the creditor cannot pursue him and hold him for the debts of the firm contracted subsequently to the change: *Dickinson v. Dickinson*, 25 Gratt. 321; *Austin v. Holland*, 69 N. Y. 371; *Laird v. Ivens*, 45 Tex. 622; *Holtgrieve v. Wintker*, 85 Ill. 472; *Young v. Tibbets*, 32 Wis. 79; *Haynes v. Carter*, 12 Heisk. 7; *Davis v. Keys*, 38 N. Y. 94; *Johnson v. Tolten*, 3 Cal. 343. The creditor must have this knowledge before he extends the credit in order to hold the outgoing member. If he credits the firm before learning this and have used due diligence on his part to ascer-

tain the fact of dissolution, though he may afterwards come to a knowledge of the dissolution, however effective and convincing this knowledge be, he is still entitled to look to the retiring partner for his debt. His right to so hold him will not depend on the knowledge he may have of the retirement at the time his debt falls due or at the time he brings his action thereon, but will depend on his knowledge or ignorance of the dissolution at the time of entering into the contract and extending the credit: *Wilkinson v. Bank of Pa.*, 4 Whart. (Pa.) 482. In a case where a firm was composed of three brothers named Wortendyke, and the style was Wortendyke & Co., one of the brothers retired selling his interest to one H. The firm name was changed to Wortendyke Bros. & Co. No notice of dissolution was given, and it was held that this change in the firm was not sufficient to put creditors upon inquiry, but that they had the right to presume that all the Wortendyke Brothers were members until notice was given to the contrary: *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 550. But, doubtless, if upon the retirement of a partner the name of the firm so changes as to be sufficient to put dealers upon inquiry, the case would be different. For instance, if A and B dissolve partnership, A selling out to B, and the latter forming a partnership with C, under the style of C & Co., this would certainly put a former creditor of A and B upon inquiry, that is, of course, if the subsequent transactions be in the name of C & Co.

The rule requiring notice of dissolution to be given applies not only to partners *de facto* but *eo nomine* as well. And where one holds himself out to the public or to creditors as a partner, he is, of course, bound for the firm debts contracted in the usual course of business just as though he were a partner to all intents and purposes. And if such ostensible partner withdraws from the firm or ceases to hold himself out to the world as a partner, it is incumbent on him to give notice of the fact, just as a partner *de facto* must. This rule is grounded upon the principle of estoppel which will not allow one to hold himself out to the public as a partner in a firm, and upon being sued on debts contracted by the firm upon the faith of his sol-

vency, say that he was not a partner. For the courts to hold otherwise would be to encourage dishonesty: *Walrath v. Viley*, 2 Bush. (Ky.) 478; *Riser v. James*, 26 Kan. 221; *Carmichael v. Greer*, 55 Ga. 116; *Warren v. Ball*, 37 Ill. 76; *Brown v. Grant*, 39 Minn. 404; *Maxwell v. Gibbs*, 32 Iowa 32; *Campbell v. Hastings*, 29 Ark. 512; *Brugman v. McGuire*, 32 Ark. 738; *Speer v. Bishop*, 24 Ohio, 598; *Humes v. O'Bryan*, 74 Ala. 64.

It is not necessary that the party hold himself out as a partner in any particular manner. It may be done by word, act, or deed as well as by conduct. In fact if he does, or omits to do, any thing or act which in any way causes the belief that he is a partner, he will not be heard to say he is not when it is sought to charge him as such: *Cirkel v. Croswell*, 36 Minn. 323. And if a person even suffer himself to be held out as a partner, he will be liable unless he give notice.

This doctrine of estoppel is well illustrated in the case of *Riser v. James*, *supra*. It seems that R. O. Riser & Co. were a firm of bankers, the firm being composed of Riser and one Moses Waters. The latter retired without giving notice thereof. He was sued on an indebtedness contracted by the remaining partner in the name of the firm, and sought to screen himself from liability under the plea that there was no proof of any partnership, and that no notice was necessary. There had been published in a local newspaper an advertisement of the banking firm in which the name of Moses appeared as one of the partners. He had put money into the enterprise, and it was notoriously and generally known in the community that he had been a partner in the business. The firm name was not changed. It was also shown that the letter-heads used by the bank contained the names of both Moses and Riser as members. These letter-heads were used after the dissolution, Riser even writing to Moses on them. These facts being shown, it was held sufficient to establish the fact that Moses either held himself out as a partner, or suffered himself to be so held out, and that he should have given notice. The usual mode of giving notice of the dissolution of a firm to new customers is by notice published in some news-

containing the same, this will not be notice. It is probable, and perhaps nothing is more common, than for persons to take newspapers without reading every advertisement they contain, and it would be going entirely beyond the pale of reason to visit a person with the knowledge of the contents of all notices contained in a paper from day to day: *Wilkinson v. Bank of Pa.*, 4 Whart. (Pa.) 482; *Austin v. Holland*, 69 N. Y. 571; *Reilly v. Smith*, 16 La. An. 31; *Meyer v. Khron*, 114 Ill. 574. And a letter stating the dissolution, which was not returned from the dead letter office, though properly mailed and directed, is not sufficient notice without other evidence of its receipt. The rule that letters properly addressed and mailed are evidence of notice is restricted to commercial paper, and does not apply in case of the dissolution of a partnership: *Kenney v. Alwater*, 77 Pa. St. 34.

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The rule requiring notice of dissolution to be given applies not only to partners *de facto* but *eo nomine* as well. And where one holds himself out to the public or to creditors as a partner, he is, of course, bound for the firm debts contracted in the usual course of business just as though he were a partner to all intents and purposes. And if such ostensible partner withdraws from the firm or ceases to hold himself out to the world as a partner, it is incumbent on him to give notice of the fact, just as a partner *de facto* must. This rule is grounded upon the principle of estoppel which will not allow one to hold himself out to the public as a partner in a firm, and upon being sued on debts contracted by the firm upon the faith of his sol-

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It is not necessary that the party hold himself out as a partner in any particular manner. It may be done by word, act, or deed as well as by conduct. In fact if he does, or omits to do, any thing or act which in any way causes the belief that he is a partner, he will not be heard to say he is not when it is sought to charge him as such: *Cirkel v. Croswell*, 36 Minn. 323. And if a person even suffer himself to be held out as a partner, he will be liable unless he give notice.

This doctrine of estoppel is well illustrated in the case of *Riser v. James*, *supra*. It seems that R. O. Riser & Co. were a firm of bankers, the firm being composed of Riser and one Moses Waters. The latter retired without giving notice thereof. He was sued on an indebtedness contracted by the remaining partner in the name of the firm, and sought to screen himself from liability under the plea that there was no proof of any partnership, and that no notice was necessary. There had been published in a local newspaper an advertisement of the banking firm in which the name of Moses appeared as one of the partners. He had put money into the enterprise, and it was notoriously and generally known in the community that he had been a partner in the business. The firm name was not changed. It was also shown that the letter-heads used by the bank contained the names of both Moses and Riser as members. These letter-heads were used after the dissolution, Riser even writing to Moses on them. These facts being shown, it was held sufficient to establish the fact that Moses either held himself out as a partner, or suffered himself to be so held out, and that he should have given notice. The usual mode of giving notice of the dissolution of a firm to new customers is by notice published in some news-

the other hand, it will not be a defense to be availed of by the outgoing partner, that the creditor, who extended indulgence to the firm, was ignorant of the fact that such partner was, at the time of the entering into of the contract, a member of the firm. The law presumes that the dealer extends credit to every member of the firm, though he does not really know every person composing it. This principle is based on the rule that all who are generally known by the public as partners, and who, in fact, are such, are liable, and, upon retiring, must give the requisite notice: *Kennedy v. Bohanno*, 11 B. Mon. (Ky.) 188; *Clapp v. Rogers*, 12 N. Y. 283. And this is the case, though the party sought to be charged be really the responsible member of the firm, and the dealer when extending the credit did not know this: *Elkington v. Booth*, 143 Mass. 479. Neither is it any defense in behalf of the retiring partner that, for any reason, he did not have time to give the notice. He is held to undertake the partnership agreement with notice of the exactions the law makes, and these he must comply with at his peril, though it may be impossible to do so in some cases: *Martin v. Searles*, 28 Conn. 43; *Bristol v. Sprague*, 8 Wend. 423.

But a person who is not a partner in a firm, though he hold himself out to the world as such, is not liable on a contract made in the name of the firm, if the credit was extended without the knowledge that he held himself out as a partner, and in such a case it will not be necessary to give notice of dissolution so far as such partner is concerned: *Thompson v. First Natl. Bank of Toledo*, 111 U. S. 529. In such cases the doctrine of estoppel does not obtain, as the dealer has not been misled. The law does not presume that credit is extended to the nominal partner unless he be known as such.

It is not sufficient for the retiring partner to give notice of the dissolution to the agent of the dealer; at least unless it be shown that the scope of the agency be such as to embrace authority to receive notice. It should in any event be shown that the agent has general authority before the principal can be held to his knowledge in the matter of such notice. And the burden of showing the authority of the agent to receive

the notice is on the party alleging he has that authority: *Stewart v. Sonnebarn*, 49 Ala. 178; *Brown v. Foster*, 19 S. E. Rep. 399. And this is the rule whether the creditor be an old or a new one: *Id.* And notice to a director of a corporation is not sufficient notice to the corporation itself. The notice should be given to some principal or managing officer, as the cashier or president: *Bank v. Norton*, 1 Hill (N.Y.), 572.

But in case of the necessity of giving notice to a firm it is not necessary to give notice to any particular member of it, nor is it necessary that all have notice. If the notice be given to any member it will suffice, and this is true though credit may be extended to the old firm by other members who are ignorant of the notice, and upon the faith in the solvency of the retiring member: *Gaar v. Huggins*, 12 Bush. (Ky.) 259. The distinction in case of a corporation and a firm. In the latter, any one partner has authority to bind all the other members in any firm transaction, and the firm is consequently charged with notice if it be brought home to any of the members. But as a corporation can only act through its board of directors and officers regularly constituted by such board, and to the extent only of the real or apparent authority of such board or officers, and a mere director having no authority to bind the corporation in any manner whatever, cannot, of course, bind it with his knowledge of the dissolution of a partnership. Who is, and who is not, a dealer within the sense and meaning of the rule, may in some cases be a question of more or less difficulty. It seems to be laid down that a single cash transaction, or, perhaps, any number of such transactions, will not constitute a person a previous dealer so as to entitle him to actual notice of the dissolution: *Merrett v. Williams*, 17 Kan. 287. A previous dealer is obviously one who has extended credit to the firm before the dissolution; who has had dealings such as to build up a credit upon the faith of the partnership. Cash transactions do not require that conservative and scrutinizing inquiry into the standing and names of the members of a partnership that is necessary and prudent in making sales on a credit. In a credit transaction, the dealer wants to know whom he is

trusting; in cash transactions it is not material, as he runs no risk in selling to any one on a cash basis. Doubtless, the number of credit transactions necessary to bring a creditor within the rule as a previous dealer is not especially material. It is enough if the creditor have extended credit on the faith of the firm and the financial responsibility of its members, and it has been held that two transactions are sufficient for all purposes: *Wardwell v. Haight*, 2 Barb. 549. And when a credit is once raised on the faith of a copartnership, the dealer has the right to presume that the partnership continues the same until he has notice to the contrary: *Id.*

But one who comes into the possession of paper of a firm through a mere casual transaction, is not, in the eye of the law, a previous dealer and is not entitled to actual notice: *Hutchinson v. Bank of Tenn.*, 8 Hump. 418.

But the rule is different if he be in the habit of discounting the bills of the old firm. In cases of this kind it is presumed that he deals in the paper on the strength of his faith in the solvency of all the partners, and he is, for all purposes of notice, a previous dealer. And a creditor who has been in the habit of taking notes of the firm in payment of sundry transactions is likewise entitled to actual notice: *Graves v. Gilbert*, 7 Cow. 701. Again, where a note made by the firm had been discounted by a bank for the accommodation of the payee, and repeatedly renewed, it is necessary that actual notice be given, as this would make the bank a previous dealer. But only those who are in the habit of taking the paper of the firm under circumstances where the knowledge of the fact on the part of the firm itself might be legally presumed will be entitled to actual notice: *Vernon v. The Manhattan Co.*, 22 Wend. 183; *Vernon v. The Manhattan Co.*, 17 Id. 527; *Brown v. Clark*, 14 Pa. 469; *Mechanics' Bank v. Livingston*, 33 Barb. 458; *Janson v. Grimshaw*, 26 Ill. App. 287; *Nott v. Downing*, 6 La. 680; *Clement v. Clement*, 69 Wis. 599.

When a partner retires, his authority to execute notes in the name of the old firm, even for the pre-existing indebtedness of the partnership, ceases. But all the partners will be

liable on such paper executed by any one of them after the dissolution, to old or new dealers, as the case may be, until actual or constructive notice, as the circumstances may call for, be given: *Davis v. Willis*. The power of the remaining partners, after the withdrawal of a member, exist until notice thereof be given as required by law. And this authority extends, not only to making ordinary purchases in the name of the old firm, but likewise to the executing and negotiating of bills payable, and commercial paper generally, with the scope of the business for which the partnership was formed. And so far as the public and prior dealers are concerned, the partnership exists, for all purposes, until the necessary notice of dissolution is given: *Amidown v. Osgood*, 24 Vt. 278.

As to dormant partners, however, a very different rule obtains. And where a dormant partner is not known to be such by the dealer when his transactions with the firm are consummated, it is not incumbent on him to give any notice on his withdrawal from the firm, and his failure or neglect to give any kind of notice whatever will not make him liable: *Nusshaumer v. Becker*, 87 Ill. 281; 1 Ewel's Lim'd. Part. (2d Am. Ed.) star p. 213; *Rand. Com. Paper*, § 427; *Wood's Byles on Bills*, star p. 51 and notes; *Id.* p. 106; *Daniel Leg. Inst.* Sec. 353; *Id.* Sec. 369 a. The foundation of the rule is, the dormant partner is not known either to the creditor or to the public as such. He is not intrusted when the firm is credited, and in the event he fails to give notice, the creditor can show no injury thereby. The creditor would never have presented his bill to this partner. He was not credited, and he made no contract; because it is familiar elementary law that the minds must meet before a contract is effectually made. He does not act the role of a partner. There is nothing to make him such in fact, so far as the outside world is concerned. So, where a firm is composed of two persons, one of whom is dormant, and whose name does not appear in the style of the firm, and a creditor takes a note for the firm debt which is signed by both the dormant and known partner, but the relation of the dormant partner is not disclosed, he will only occupy the relation to the creditor of a surety, guarantor or indorser, as the case

containing the same, this will not be notice. It is probable, and perhaps nothing is more common, than for persons to take newspapers without reading every advertisement they contain, and it would be going entirely beyond the pale of reason to visit a person with the knowledge of the contents of all notices contained in a paper from day to day: *Wilkinson v. Bank of Pa.*, 4 Whart. (Pa.) 482; *Austin v. Holland*, 69 N. Y. 571; *Reilly v. Smith*, 16 La. An. 31; *Meyer v. Khron*, 114 Ill. 574. And a letter stating the dissolution, which was not returned from the dead letter office, though properly mailed and directed, is not sufficient notice without other evidence of its receipt. The rule that letters properly addressed and mailed are evidence of notice is restricted to commercial paper, and does not apply in case of the dissolution of a partnership: *Kenney v. Alwater*, 77 Pa. St. 34.

It is not necessary, however, that the creditor have actual notice of the dissolution of a copartnership. He may have a knowledge of such facts and circumstances as are inconsistent with anything less than notice. Or, if we have information of facts, which if diligently followed up with inquiry, would lead to a knowledge of the fact of dissolution, he shall be deemed in law to have actual knowledge of it. He cannot be wilfully blind when facts that imply the necessary information are brought to his knowledge. The law requires the retiring partner to give the necessary notice; none the less, however, does it require the creditor to use proper diligence and the means of information when he has that means: *Prentiss v. Sinclair*, 5 Vt. 149; *Pope v. Risely*, 23 Mo. 185; *Stewart v. Sonnebarn*, 49 Ala. 178; *Rimel v. Hays*, 83 Mo. 200; *Johnson v. Tolten*, 3 Cal. 343.

But it is not every kind of information that a creditor is bound to pursue in order to hold the retiring partner; for instance, every one is charged with knowledge of the contents of the public records of the courts, the records of deeds and mortgages, etc., but the recording of a mortgage executed by the remaining member of the firm to the retiring partner, is not notice to the world nor to the creditor that there has been a dissolution, and this though the property embraced in

the mortgage be goods like those of the firm, and actual knowledge of the existence of such a mortgage be brought home to the creditor, does not charge him with notice, nor, as matter of law, put him upon inquiry. The fact that the creditor may have had the means of knowledge which, if followed up diligently, would have revealed the dissolution, yet this will not charge him unless the circumstances were such as to put him upon inquiry. If any question should arise involving the title to the property mortgaged, the mortgage being properly registered, would be constructive and conclusive notice to purchasers because it would be their duty to look to the registry for conveyances affecting the property. No such duty, however, rests upon a creditor of a firm to learn of the dissolution thereof. The law does not require that the retirement of a partner should be matter of record where deeds and mortgages should be registered, and of course there can be no requirement that a creditor look for a record to ascertain of a dissolution. It must be the duty of the creditor to follow up the knowledge that puts him upon inquiry before he can be charged with knowledge of what a due inquiry would lead up to: *Zollar v. Jarvin*, 47 N. H. 324.

If the creditor have notice of the dissolution, whether directly from the retiring partner or from third persons or from having seen the same advertised, or if he have the information from any source or in any mode whatsoever. It is sufficient if he have it. When this is the case all is accomplished that could be effected by serving actual notice upon him, or by the most diligent advertising, and this is true, though the retiring partner be negligent in not giving notice, yet the creditor cannot pursue him and hold him for the debts of the firm contracted subsequently to the change: *Dickinson v. Dickinson*, 25 Gratt, 321; *Austin v. Holland*, 69 N. Y. 371; *Laird v. Ivens*, 45 Tex. 622; *Holtgrieve v. Wintker*, 85 Ill. 472; *Young v. Tibbets*, 32 Wis. 79; *Haynes v. Carter*, 12 Heisk. 7; *Davis v. Keys*, 38 N. Y. 94; *Johnson v. Tolten*, 3 Cal. 343. The creditor must have this knowledge before he extends the credit in order to hold the outgoing member. If he credits the firm before learning this and have used due diligence on his part to ascer-

tain the fact of dissolution, though he may afterwards come to a knowledge of the dissolution, however effective and convincing this knowledge be, he is still entitled to look to the retiring partner for his debt. His right to so hold him will not depend on the knowledge he may have of the retirement at the time his debt falls due or at the time he brings his action thereon, but will depend on his knowledge or ignorance of the dissolution at the time of entering into the contract and extending the credit: *Wilkinson v. Bank of Pa.*, 4 Whart. (Pa.) 482. In a case where a firm was composed of three brothers named Wortendyke, and the style was Wortendyke & Co., one of the brothers retired selling his interest to one H. The firm name was changed to Wortendyke Bros. & Co. No notice of dissolution was given, and it was held that this change in the firm was not sufficient to put creditors upon inquiry, but that they had the right to presume that all the Wortendyke Brothers were members until notice was given to the contrary: *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 550. But, doubtless, if upon the retirement of a partner the name of the firm so changes as to be sufficient to put dealers upon inquiry, the case would be different. For instance, if A and B dissolve partnership, A selling out to B, and the latter forming a partnership with C, under the style of C & Co., this would certainly put a former creditor of A and B upon inquiry, that is, of course, if the subsequent transactions be in the name of C & Co.

The rule requiring notice of dissolution to be given applies not only to partners *de facto* but *eo nomine* as well. And where one holds himself out to the public or to creditors as a partner, he is, of course, bound for the firm debts contracted in the usual course of business just as though he were a partner to all intents and purposes. And if such ostensible partner withdraws from the firm or ceases to hold himself out to the world as a partner, it is incumbent on him to give notice of the fact, just as a partner *de facto* must. This rule is grounded upon the principle of estoppel which will not allow one to hold himself out to the public as a partner in a firm, and upon being sued on debts contracted by the firm upon the faith of his sol-

vency, say that he was not a partner. For the courts to hold otherwise would be to encourage dishonesty: *Walrath v. Viley*, 2 Bush. (Ky.) 478; *Riser v. James*, 26 Kan. 221; *Carmichael v. Greer*, 55 Ga. 116; *Warren v. Ball*, 37 Ill. 76; *Brown v. Grant*, 39 Minn. 404; *Maxwell v. Gibbs*, 32 Iowa 32; *Campbell v. Hastings*, 29 Ark. 512; *Brugman v. McGuire*, 32 Ark. 738; *Speer v. Bishop*, 24 Ohio, 598; *Humes v. O'Bryan*, 74 Ala. 64.

It is not necessary that the party hold himself out as a partner in any particular manner. It may be done by word, act, or deed as well as by conduct. In fact if he does, or omits to do, any thing or act which in any way causes the belief that he is a partner, he will not be heard to say he is not when it is sought to charge him as such: *Cirkel v. Croswell*, 36 Minn. 323. And if a person even suffer himself to be held out as a partner, he will be liable unless he give notice.

This doctrine of estoppel is well illustrated in the case of *Riser v. James*, *supra*. It seems that R. O. Riser & Co. were a firm of bankers, the firm being composed of Riser and one Moses Waters. The latter retired without giving notice thereof. He was sued on an indebtedness contracted by the remaining partner in the name of the firm, and sought to screen himself from liability under the plea that there was no proof of any partnership, and that no notice was necessary. There had been published in a local newspaper an advertisement of the banking firm in which the name of Moses appeared as one of the partners. He had put money into the enterprise, and it was notoriously and generally known in the community that he had been a partner in the business. The firm name was not changed. It was also shown that the letter-heads used by the bank contained the names of both Moses and Riser as members. These letter-heads were used after the dissolution, Riser even writing to Moses on them. These facts being shown, it was held sufficient to establish the fact that Moses either held himself out as a partner, or suffered himself to be so held out, and that he should have given notice. The usual mode of giving notice of the dissolution of a firm to new customers is by notice published in some news-

COMMUNICATIONS.

A COMMENT ON DR. BANNISTER'S VIEW OF THE PRENDERGAST CASE.

The most striking feature of Dr. Bannister's article on the Prendergast Case, published in the last number of *THE AMERICAN LAW REGISTER AND REVIEW*, is its utter failure to touch the vital point in the case. That point, as in every case in which insanity is set up as a defence, was not whether the criminal was insane, but whether he was responsible. A man can be insane and responsible at the same time. The two conditions are not interdependent. It would not necessarily follow, then, that Prendergast was wrongfully punished, even if we admit the jury to have made a mistake in their finding as to his sanity. But Dr. Bannister should also bear in mind that the opinions of experts are by no means conclusive of facts—no opinion can be; and even if the learned doctors who gravely pronounced their dicta on the hypothetical question put, were the polestars of their profession, it does not necessarily follow that the jury who saw and listened to the criminal were not, by very reason of their lack of special training, better fitted to decide impartially. Overfine training in any special department is apt to lead to results that themselves partake of the character of a mild mania. A highbred pointer kept in the city, away from all opportunities to exercise his special powers, has been known, when taken out for a walk, to point a fan or a piece of paper; and the same tendency is unfortunately too apparent in some modern experts.

Before the punishment of Prendergast can be justly impugned, then, these facts must be established. 1. That he was insane, not merely supposed to be, on the strength of hereditary influence, physical condition and erratic action, by men whose business it is to ferret out such facts. 2. That, supposing him to have been insane, that insanity was of a nature to negative his responsibility. On this last question the law and the doctors are, and probably will always be, at war; but fortunately for the welfare of the country, the law has the upper hand.

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agreement that they should adopt, rear and educate her, and at their death leave her all the property they might own,—in pursuance of which she lived with them till they died, taking their name, and being taught to consider them her father and mother, and her real parents her uncle and aunt,—but the adoptive parents did not devise to her a certain piece of real estate, the facts amounted to such a part performance of the agreement as would entitle her to a decree giving her possession of the land by way of specific performance.

The Court of Civil Appeals of Texas has very properly ruled that a change in the Christian name of a defendant is not such an amendment as will give him the benefit of the statute of limitations: *Middlebrook v.*

Amendment *David Bradley Mfg. Co.*, 27 S. W. Rep. 169; and the Supreme Court of Wisconsin holds, in accordance with the weight of authority and principle, that when the record in a criminal case, through the negligence of the clerk, fails to show that the defendant was present at all times during the trial, it may be amended to show such facts, on the testimony of the clerk and the sheriff, after the defendant has sued out a writ of error, and at a subsequent term: *Hoffman v. State*, 59 N.W. Rep. 588.

The Supreme Court of Minnesota holds that when all the orders of an award are to be performed by one party, some of

Arbitration, which are good and some bad, the latter fact will
Award not discharge the party as to those which are good: *Bouck v. Bouck*, 59 N. W. Rep. 547.

When an insolvent debtor executes a chattel mortgage to several creditors, with power of sale, conditioned that any surplus over their claims shall be returned to the

Assignment for benefit of creditors grantor, such an instrument is not to be construed as a general assignment for the benefit of creditors, according to the Court of Appeals of Colorado: *McCord-Braddon Co. v. Garrison*, 37 Pac. Rep. 31; nor is a trust deed, under such circumstances, as decided by the Court of Civil Appeals of Texas: *Collins v. Sanger*, 27 S. W. Rep. 500; nor, in the opinion of the Supreme Court of Nebraska, will

of research itself the highest value, even for lower schools, quite apart from the value of discoveries.

It seems strange that so little attention has been paid to the bearing of such considerations as these upon the subject of legal education, especially in view of the fact that a somewhat heated debate is in progress at the present time with respect to the proper method of law school instruction. The explanation is probably to be found in the fact that the study of law, in this country, is commonly looked upon as a department of education widely separated from all others—the lawyer, with characteristic narrowness, believing himself to be there in a world of his own creation, where no principles of education are recognized save those which he himself evolves. It is assumed that all problems which arise are to be solved with reference to the consideration that the subject to be taught and learned is *law*, instead of with reference to the consideration that the problem is, before all else, an educational problem. It follows from this that almost every lawyer with whom one converses on the subject of legal education is ready to speak *ex cathedra* and, merely in virtue of the circumstance that he is a member of the bar, to pronounce the most positive opinions upon the most difficult educational questions. In New York city, for example, where the contest is fiercest between the so-called "Case-System" and the so-called "Dwight Method," the school which seeks to identify itself with the latter intrenches itself behind a published list of the names of members of the New York Bar who signed the petition for the incorporation of the school—the inference being that they took this step because of a settled opinion favorable to that particular method of instruction. It is indeed true that, considering the efforts which must have been made to obtain signatures, the list is more notable for the names which it does not than for those which it does contain; and it is also true that some of the gentlemen whose names appear on the list attained their present conspicuous positions for reasons other than the profundity of their legal learning. The point insisted on, however, is this: that there is among lawyers a tendency to decide questions of this sort by a mere count of heads and to seek to

than legal grounds—such as the impropriety of permitting women to handle the filth which is so apt to defile a lawyer's hands in certain classes of cases, and the like; that in most of the states where the right has been refused, that refusal has been followed by an express grant from the legislature; and that the tendency of the more recent cases has been almost uniformly in favor of the admission of women: *Re Mary Hall*, 50 Conn. 131; S. C., 21 Am. L. Reg. (N. S.) 728; *Re Kilgore*, 14 W. N. C. 466; S. C., 17 W. N. C. 475, 562; *Re Thomas*, 16 Colo. 441; S. C., 27 Pac. Rep. 707; *Re Leach* (Ind.), 34 N. E. Rep. 641.

An attorney's lien for services cannot be successfully asserted against money appropriated to the client by act of the legislature, while such money is in the custody or under the control of the state treasurer, by the decision of the Supreme Court of Nebraska: *State ex rel. Sayre v. Moore*, 59 N. W. Rep. 755; and according to the Supreme Court of Oregon, a district attorney is entitled to but one fee, where several persons are jointly indicted for the same offence and jointly tried: *Union Co. v. Hyde*, 37 Pac. Rep. 76:

The Supreme Court of Nebraska has laid down a very reasonable rule with regard to membership in a railroad relief association, in *Burlington Vol. Relief Dept. v. Beneficial Associations White*, 59 N. W. Rep. 747, by holding that when the department, with knowledge of the fact that no formal application for membership had ever been made, caused assessments to be deducted from a supposed member's pay on the basis of such membership, it was thereby estopped from disputing his membership. Of even more importance to the beneficial societies of which this country is full, was the decision of the Supreme Court of Errors of Connecticut, in *Fawcett v. Supreme Sitting of Order of Iron Hall*, 29 Atl. Rep. 614, to the effect (1) that when the certificate issued promises to pay \$1000 in seven years, on payment of \$2.50 on each assessment, but is silent as to the number of assessments to be made, the society cannot be said as a matter of law to be guilty of fraud; and (2) that when a

beneficial organization doing business in several states becomes insolvent, and a receiver of all its estate is appointed by a court of the state in which it was incorporated, a receiver appointed in one of the other states is not to pay over to him the reserve fund held by it in that state, though claimed by the general receiver for general distribution among certificate holders, but it should be retained for distribution in their own state by election of the certificate holders to treat the contract as rescinded and demand a return of the payment made. The Court of Appeals of Maryland refused to allow the claim made by a general receiver appointed for the whole against local receivers, unless the former could show that their authority extended to the local branches, and that the property in the hands of the latter belonged to the whole. *Sitting and not to the local branches: Weiner v. Bank of New York*, 29 Atl. Rep. 613. These decisions, however, are questionable innovations on the general rule in such cases, which is, as truly said by Hamersley, J., in his dissenting opinion in the Connecticut case, that when a corporation is chartered by a single state, and does a lawful business in other states, through agencies, and becomes insolvent, its assets should be gathered at the domicile and there distributed according to the principles of equity.

The Supreme Court of Nebraska, following the decision of the Supreme Court of the United States in *Nebraska v. Omaha*, 12 Sup. Ct. Rep. 396, has lately decided, *Boundaries*, that the general rule, that when the middle of a stream is the boundary between two estates, and the stream changes its bed by cutting across a bend or neck, the middle of the new bed remains the boundary, though dry: *Stricklett*, 59 N. W. Rep. 550. And the Supreme Court of Indiana has ruled, that land described as bounded by the line of a railroad extended to the line of rails, if the

could convey so far, and not simply to the right of way: *Reid v. Klein*, 37 N. E. Rep. 967.

The constantly mooted question as to the liability of common carriers with connecting lines has been considerably elucidated by the published decisions of the past month. The Supreme Court of Minnesota has held that such carriers do not become joint carriers by establishing joint or through tariffs or rates, but the one receiving the goods becomes the agent of the others to contract for carriage over their respective lines: *Wehmann v. Minn., St. P. & S. M. Ry. Co.*, 59 N. W. Rep. 546. The Court of Civil Appeals of Texas has decided that when connecting carriers are partners in the transportation of freight, the initial carrier cannot by contract limit its liability for injuries to through freight to such injuries only as occur on its lines: *Gulf, C. & S. F. Ry. Co. v. Wilbanks*, 27 S. W. Rep. 302; and the Supreme Court of Michigan has taken the ground that when a shipper knows that his goods must be delivered to a connecting line, and agrees that after the goods leave the receiving road it shall be treated as a forwarder only, the receiving road will not be liable for a conversion by the connecting line: *McEacheran v. Mich. Cent. Ry. Co.*, 59 N. W. Rep. 612. Apropos of the general subject of liability, the Supreme Court of Minnesota also held, in the case from that state last cited, that a stipulation that a common carrier should be relieved from liability needs a consideration to make it binding; that the mere receipt of goods and undertaking to carry them is not such a consideration; and that no abatement or concession in rates, when forbidden by law, can form a sufficient consideration: *Wehmann v. R. R.*, *supra*. But the Supreme Court of Missouri has ruled that a statute, which provides that a common carrier shall be liable for any loss caused by its own negligence, or that of any connecting carrier, does not prohibit a carrier from contracting with the shipper against liability beyond its own line: *McCann v. Eddy*, 27 S. W. Rep. 541.

In the opinion of the Supreme Court of Indiana, the board

of county commissioners is a corporation, capable of taking a devise for the establishment of a home for the benefit of worthy homeless people and orphans: *Comrs. of Rush Co. v. Dinwiddie*, 37 N. E. Rep. 795.

Charities

The same court has also ruled that in considering the constitutionality of a statute, the court has no right to take into consideration its justice, advisability and policy: *State ex rel. Smith v. McLellan*, 37 N. E. Rep. 799. The Supreme Court of New Hampshire holds that, when the constitution provides that the house of representatives shall be judge of the returns, election and qualifications of its members, no court is authorized to order or advise the clerk as to whose name shall be placed on the roll: *Bingham v. Jewett*, 29 Atl. Rep. 694; the Supreme Court of Minnesota, that a statute which requires street railway companies to protect motormen from the weather by an inclosure for that purpose, is constitutional: *State v. Hoskins*, 59 N. W. Rep. 545; and the Supreme Court of New York, Fifth Dept., that a statute amending a statute already superseded by an amending statute is valid when the evident intention was to amend the amendatory statute, and not the amended statute: *Peo. v. Upson*, 29 N. Y. Suppl. 615. With this last case may be compared an annotation on the effect of an amending statute, in 1 Am. L. Reg. & Rev. (N. S.), 566-571.

The statute of frauds continues to receive its full share of attention. The Supreme Court of Nebraska has decided that the verbal promise of A to B, to indemnify him if he will become surety for C for a debt of the latter to D, is not a promise on the part of A to answer for the debt of C within the statute: *Minick v. Huff*, 59 N. W. Rep. 795; and the Supreme Court of Michigan, that a written order to insert an advertisement is such a written contract as to exclude evidence of a contemporaneous parol agreement that if the advertisement did not suit, it could be discontinued at any time: *Cohen v. Jackoboice*, 59 N. W. Rep. 665. On the general subject of contracts, the Appellate Court of Indiana has held, in opposition to *Davis v. Shafer*, 50 Fed. Rep. 764,

Contracts

that a contract of subscription which provides that the subscribers would pay the builder of a factory a certain amount, and stating the amount of their respective subscriptions thereto, is several, not joint: *Davis & Rankin Mfg. Co. v. Booth*, 37 N. E. Rep. 818. The Supreme Court of Michigan has decided that an order taken by the plaintiff's agent from defendant for the purchase of goods from the plaintiff, subject to plaintiff's approval, was a unilateral contract, subject to countermand by defendant at any time before acceptance, though the order expressly stated that it was not so subject; that a letter from defendant to plaintiff, reciting that plaintiff had received an order from defendant for an article, and asking him to hold it until further notice, was a countermand; and that mailing a postal to defendant accepting the order, before receiving notice of the countermand, made the contract complete: *Puck v. Freeze*, 59 N. W. Rep. 600. The Supreme Court of Indiana, following the weight of authority and rejecting *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, has adopted the doctrine that a water company, that agrees to supply water to a city to extinguish fires, is not liable to a private person whose property is destroyed in consequence of its failure to furnish water, as he is not a party to the contract: *Fitch v. Seymour Water Co.*, 37 N. E. Rep. 982. The Supreme Court of Wisconsin has repeated the well-settled rule that a wife may avoid her contract, extorted by a threatened criminal prosecution of her husband, on the ground of duress: *City Natl. Bk. of Dayton v. Kusworm*, 59 N. W. Rep. 564; and the Supreme Court of Nebraska has ruled that the defence of insanity may be set up to an action on a contract, without restoring what the insane person receives thereunder, if its restoration *in specie* is impossible: *Rea v. Bishop*, 57 N. W. Rep. 555.

The court last mentioned has also decided that when the officers of a corporation are shown to have abused their trust, to the great damage of the corporation, in the interest of another corporation, of which they were and still are managing officers, any stockholder of the corporation wronged may bring an action in his own name for the

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benefit of that corporation against the other corporation for redress of such grievances and for an accounting between the two corporations; and may join both corporations as defendants: *Fitzgerald v. Fitzgerald & Mallory Constr. Co.*, 59 N. W. Rep. 838. The Supreme Court of Michigan has come to the conclusion that when three persons agree to build a railroad, and form a corporation for that purpose, two of them to furnish the capital, the third to have general charge of the construction, and the road to be sold when built and the proceeds equally divided, the third person could bind the corporation for supplies used in constructing the road, though not acting by any corporate authority: *Mich. Slate Co. v. Iron Range & H. B. Ry. Co.*, 59 N. W. Rep. 646; and that an injunction should not issue at the suit of a receiver to enjoin a creditor, who has garnished certain funds of the debtor corporation, from proceeding with his suit, as he has a right to be heard in such proceedings as to his right to the funds garnished: *Baldwin v. Hosmer*, 59 N. W. Rep. 669. On appeal from an order appointing a receiver, the Supreme Court of Washington does not consider itself limited to the jurisdiction of the appointing court, but will determine whether the order appealed from was authorized by the law and the facts: *Roberts v. Wash. Natl. Bk.*, 37 Pac. Rep. 26. According to the Supreme Court of California, an indictment of an officer of a corporation for making false entries, if it set out the entries *in hac verba*, and allege them to be false, need not state wherein they were false: *Peo. v. Leonard*, 37 Pac. Rep. 222; and the Supreme Court of Texas has decided that a private corporation may be sued for causing death, under a statute which provides that an action for damages may be brought "when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another": *Fleming v. Texas Loan Agency*, 27 S. W. Rep. 126.

The Supreme Court of Indiana holds to the doctrine that a deed to the "heirs" of a living person is void for uncertainty as to grantees: *Booker v. Tarwater*, 37 N. E. Rep. 979; but the Court of Civil

Appeals of Texas thinks that a deed of so many acres of land out of a tract described is not void for uncertainty, but conveys a proportionate undivided interest: *Linnartz v. McCulloch*, 27 S. W. Rep. 279. In the opinion of the Supreme Court of Pennsylvania, when the grantor permits the use of the land for eleven years in breach of a condition, with knowledge of that fact, equity should not permit a forfeiture: *Lehigh Coal & Nav. Co. v. Early*, 29 Atl. Rep. 736. And the Court of Appeals of Maryland has ruled that when a deed reserves a road through the land conveyed, in order to enable the grantor to reach a highway from other lands owned by him, the presumption is, in the absence of a clear indication in the deed to the contrary, that he reserves only the use of the road, and not the fee therein: *The Redemptorist v. Wenig*, 29 Atl. Rep. 667.

The Supreme Court of New York, Fifth Dept., has lately decided that when a contractor, who is erecting a house, refuses to allow the owner to enter, during the process of construction, for the purpose of inspecting it while the work is in progress, ejectionment will lie: *Smith v. Revels*, 29 N. Y. Suppl. 658.

According to the Supreme Court of Kansas, when the certificate of nomination, in due form, is presented to the county clerk in time for filing, a failure on his part to mark it filed, and the loss of it through his negligence, will not affect the validity of the nomination: *Rathburn v. Hamilton*, 37 Pac. Rep. 20; and the same court has very justly decided that when all the voters of a township used tinted sample ballots by mistake, the official ballots being all returned unused, and the election was regular in all other respects, the ballots were properly counted: *Boyd v. Mills*, 37 Pac. Rep. 16. The number of votes cast at an election, however, as has been ruled by the Supreme Court of Nebraska, is not conclusive of the number of qualified voters in the district: *Fullerton v. Sch. Dist.*, 59 N. W. Rep. 896.

The Supreme Court of Rhode Island holds that when a

person purchases a lot in a platted addition to a city
acquires a private right of way over the s
thereof; and the fact that such a street is
wards taken as a highway does not prevent the owner
lot from recovering damages from a railroad company
closes such street, so as to leave his lot in a *cul-de-sac*, fo
actual injury to his lot: *Johnson v. Old Colony R.*
29 Atl. Rep. 594. The Supreme Court of Maryland
decided that when, in a like case, the original owner of the
has sold a lot described as abutting on a certain
the alley is dedicated to the public; and an ordinance ena
that the portion of the alley between lots reserved by
should be closed, and authorizing her to erect a bui
thereon, shutting off others from access to a street with v
the alley connected, was invalid, as a taking of the eas
of the other lot owners for private use: *Van Witson v.*
man, 29 Atl. Rep. 608. The Supreme Court of Illinois
made a similar ruling in *Field v. Barling*, 37 N. E. Rep.
to the effect that an ordinance granting to private parties
right to construct for their own use a bridge over a p
alley is invalid, as cities hold the fee of the streets for p
uses only.

According to a recent decision of the Supreme Court of Nebraska, that court, on error from a justice of the peace to the district court, and then from the affirmance of the judgment to the Supreme Court, will not consider errors assigned to the district court: *Weeks v. Wheeler*, 59 N. W. Rep. 554. The Supreme Court of Missouri holds that when a cause is reversed and remanded with directions to modify the judgment in a certain specified manner, the court below has no discretion to open the judgment in order to adjust rights of parties accrued pending the appeal; but that those must be settled by a new suit. That the lower court can do is to carry out the mandate of the Supreme Court: *Young v. Thrasher*, 27 S. W. Rep. 326.

This same court has introduced a dangerous innovation in the law of error and appeal, by a divided court, the ju-

standing four to three in favor of the point decided. The decision is to the effect that when the damages recovered in an action at law are excessive, the Supreme Court may require the plaintiff to remit the excess, as a condition of affirmance, without depriving either party of his right to a trial by jury: *Burdick v. Mo. Pac. Ry. Co.*, 27 S. W. Rep. 453. The dissenting judges were Sherwood, Barclay and Gantt, and that fact of itself is enough to overrule the majority opinion, even without the cogent reasoning with which they support their position. The power of the Supreme Court over damages that are capable of liquidation is unquestionable; but to extend this to damages for a tort, which lie wholly within the discretion of the jury, has rarely been attempted, and has met with deserved failure. With all due respect for that august body, it is a matter of which it is utterly incapable to judge properly.

The Court of Appeals of Maryland has decided that in an action on a policy of life insurance, copies of the record of deaths of the city of Baltimore cannot be offered in evidence to show the nature of the disease from which the relatives of the insured died, as they are unsworn statements and hearsay: *Met. L. I. Co. of N. Y. v. Anderson*, 29 Atl. Rep. 606. This reasoning, however, ought not to apply to records made up from the sworn affidavits of the attending physicians, as they are in other states. The Supreme Court of Michigan has very justly ruled, that as the statutes and reports of other states are documents, whenever the law of a state, as shown by them, is undisputed as to the point in question, the court may properly charge as a fact that such is the law: *Rice v. Rankins*, 59 N. W. Rep. 660; and the Supreme Court of Nebraska has adjudged that as against strangers thereto, a receipt is incompetent evidence of the payments thereby acknowledged, being, so far as they are concerned, but the hearsay declaration of the party who made it: *Ellison v. Albright*, 59 N. W. Rep. 703.

The Supreme Court of Wisconsin holds that the competency of a five-year-old child to testify is a matter within the

discretion of the trial court: *State v. Juneau*, 59 N. W. Rep. 580; and that a person who claims no interest in the suit, and through whom neither party claims, is competent to testify to a conversation between plaintiff's manager and a deceased defendant: *Curtis v. Hoxie*, 59 N. W. Rep. 581. Somewhat more doubtful is the ruling of the Supreme Court of Rhode Island, that the defendant to an action by a surviving partner may testify as to conversations with the deceased partner, as, the conversations being with the partnership, the death of the deceased partner is not the death of the other party within the statute: *Clapp v. Hull*, 29 Atl. Rep. 687. There are numerous cases to the same effect; but the Supreme Court of Pennsylvania enunciated a sounder doctrine when it ruled the opposite in *Dick v. Williams*, 130 Pa. 41.

The Supreme Court of South Dakota reached a just conclusion in *Brown v. Edmunds*, 59 N. W. Rep. 731, by deciding that a watch and chain, habitually carried upon the person of the debtor, for his own convenience, and not used by his household, nor for the benefit or comfort of the family, is not exempt as "household furniture." Yet one can imagine how Sergeant Buzfuz would have expatiated on the value of that watch in securing the proper cooking of soft-boiled eggs, the getting of produce to the train in time for market, etc., etc.

According to the sound rule adopted by the Supreme Court of Ohio, when the defendant in a prosecution for forgery admits the making of the signature, the burden of proof is not on him to prove that he had authority, but on the state to prove that he signed the name without authority: *Romans v. State*, 37 N. E. Rep. 1040. See *Pco. v. Wiman*, 23 N. Y. Suppl. 1034.

In the opinion of the Supreme Court of Kansas, a creditor, who, in absolute good faith, takes the property of his debtor at a fair valuation in payment of an honest debt, commits no fraud against any one, although the payment of his debt may absorb the entire property of his debtor: *Hanic v. Connor*, 37 Pac. Rep. 128; and according

to the Supreme Court of Washington, a mortgage given in good faith to a creditor, by a firm doing a paying business, is not void as to other creditors because its debts were greater than its assets, apart from the good-will, when the mortgage was given: *Brookes v. Skookum Mfg. Co.*, 37 Pac. Rep. 284; and a mortgage given to secure a *bona fide* debt is valid, by the ruling of the Supreme Court of Texas, though an ulterior purpose of the debtor is to prevent the property mortgaged from being subjected to the claim of another creditor: *Haas v. Kraus*, 27 S. W. Rep. 256; but the Supreme Court of Missouri has very properly decided that absolute deeds, given by one banking house to another as security for loans and discounts, and withheld from record for three years, so as not to injure the debtor's credit, are, as matter of law, fraudulent as to subsequent creditors: *State Sav. Bk. v. Buck*, 27 S. W. Rep. 341. The Supreme Court of Michigan has permitted a deed, executed by sons to a father, who had great influence over them, for their interest in certain lands, with the understanding that he would only use it to induce their sister to do likewise, to be rescinded in equity, though the sons were participants in their father's fraudulent design: *Peek v. Peek*, 59 N. W. Rep. 604; and the Supreme Court of Wisconsin has held that when the son-in-law and housekeeper of a trustee purchases lands from one to whom they had been fraudulently conveyed by the trustee, the mere taking of a deed therefor from the trustee is not sufficient to charge them with notice of the breach of trust, if the price paid is adequate: *Hawley v. Tesch*, 59 N. W. Rep. 670.

The Supreme Court of Michigan holds that a guardian, who has enough personalty in her hands for the maintenance of her wards, cannot charge their real estate by her contracts for necessities: *Rosecoe v. McDonald*, 59 N. W. Rep. 603.

A curious question has recently been decided by the Supreme Court of California, where the board of directors of the state prison attempted to close a public highway running through the prison grounds; and it was

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held that they could not do so, even though it facilitated the escape of prisoners, because the easement which the public have in a highway does not merge in the fee of the servient estate, when acquired by the state: *Pco. v. Marin Co.*, 37 Pac. Rep. 203. It might have been urged with equal truth that the state in its corporate capacity, as owner of the prison grounds, and the public in its collective capacity, as owner of the easement in the highways, were in the eye of the law distinct entities. The state can sell the grounds used as a prison; it cannot barter away the easement of the public in the streets.

The Supreme Court of Nebraska holds that, notwithstanding the married women's acts, the husband may recover to the extent that the injury sustained by the wife incapacitates her from performing the duties that reasonably devolve upon her in the marriage relation, such as her services and companionship: *Omaha & R. V. Ry. Co. v. Chollette*, 59 N. W. Rep. 921. This is based on the decision of the Supreme Court of Iowa, made years ago, in *Mewhister v. Hatten*, 42 Iowa, 288.

The wife meets with equal consideration. The Supreme Court of Arkansas will permit her to claim a homestead which she continues to occupy with her family after the husband has become a fugitive from justice: *Hollis v. State*, 27 S. W. Rep. 73; and the Supreme Court of Missouri will not allow non-resident creditors a remedy against a married woman, also non-resident, which the laws of that state deny to residents, on the rather flimsy principle that the *lex fori* governs as to remedies: *Ruhe v. Buck*, 27 S. W. Rep. 412. But by the *lex loci contractus* she was liable to suit; and on the authority of *Hill v. Chase*, 143 Mass. 129; S. C., 9 N. E. Rep. 30; and *Baum v. Birchall*, 150 Pa. 165; S. C., 24 Atl. Rep. 620; as well as of the other authorities cited by Sherwood, J., in his dissenting opinion, the decision seems unsound. The same court did better when it held, in *Porter v. Reed*, 27 S. W. Rep. 351, that married women, though under disability, are proper defendants to a suit in equity to prevent multiplicity of actions.

The Supreme Court of Texas seems to stick in the bark when it claims that a fire insurance policy, containing a clause that it shall at once become null and void, and the insurance unearned premiums be returned, if the premises become vacant without consent of the company, is avoided by a vacancy of three days, incident to a change of tenants: *East Tex. F. I. Co. v. Kempner*, 27 S. W. Rep. 122; but the Supreme Court of Nebraska is unquestionably right in deciding that, when a policy provides that no action shall lie unless begun within six months after the loss, and that the damages are payable sixty days after satisfactory proofs of loss are furnished, the six months' limitation does not begin to run until the expiration of the sixty days: *German Ins. Co. v. Davis*, 59 N. W. Rep. 698.

The Supreme Court of the United States, over the dissent of Chief Justice Fuller and Justices Brewer and Jackson, has recently decided that the provisions of § 12 of the Interstate Commerce Interstate Commerce Act, authorizing circuit courts, on refusal of any person to obey a subpoena issued by the interstate commerce commission, to order such person to appear before the commission to give evidence, and to punish a failure to obey such order as a contempt, are constitutional: *Interstate Commerce Commission v. Bruneau*, 14 Sup. Ct. Rep. 1125. The whole proceeding bears a suspicious resemblance to an attempt to do an illegal act by legal means; and it would be hard to find an analogy to it that has stood the test of investigation. It is to be feared that in this, as in so many other recent cases, both in federal and state courts, the court has been misled into considering the end, rather than the means by which it was to be attained.

The Supreme Court of Nebraska has allowed itself to be persuaded into a reaffirmance of the strictly logical and legal, but wholly inequitable doctrine, that when a judgment Judgments is rendered in a suit begun before the term, its lien relates back to the first day of the term, and is prior to that of a mortgage executed during the term, but before the rendition of judgment: *Norfolk St. Bk. v. Murphy*,

59 N. W. Rep. 707. To their honor be it said, Ryan and Ragan, CC., dissented. If it is really impossible for the courts to break away of their own motion from doctrines like these, the legislature should be at once informed and convinced of its duty to take the matter in hand.

The same court holds that, when there is a contract between the owner of land and another person, by which the latter is to cultivate the land and harvest the hay grown thereon for a share thereof, but the relation of landlord and tenant is not created, and there is no specific agreement as to the possession of the land, the parties become tenants in common of the crop; and if one seizes the whole, either before or after severance, and disposes of it in denial of the other's right, the other may maintain trover for his share: *Reed v. McRill*, 59 N. W. Rep. 775. The Supreme Court of Minnesota has decided that neither a mortgagee in possession, nor an assignee of rents growing out of a lease assigned to him as security, has such an estate as brings him in privity with the lessee under a lease executed by the mortgagor, so as to make him liable upon the covenants in the lease: *Cargill v. Thompson*, 59 N. W. Rep. 638. The Supreme Court of Michigan has ruled that when, by the terms of a lease, buildings are to be removed by the lessee on expiration of the term, a refusal to permit their removal is a conversion: *Osborn v. Potter*, 59 N. W. Rep. 606; and the Supreme Court of Nebraska has held that a ratification by the landlord of the unauthorized act of a tenant in erecting buildings, by allowing the cost of the buildings as a proper charge against him on settlement, will render the estate of the landlord liable to a mechanics' lien arising out of the improvements: *Scroggin v. Natl. Lumber Co.*, 59 N. W. Rep. 548. By a decision of the Supreme Court of Massachusetts, lessees who are bound to rebuild can recover the full value of buildings from a railroad negligently setting them on fire: *Anthony v. N. Y., P. & R. Co.*, 37 N. E. Rep. 780.

According to the Supreme Court of Michigan, one who has

cut and rafted logs under a contract, by the terms of which he is entitled to retain possession until paid for his services, has a common law lien thereon, if he complies with the contract; and the fact that the owner obtains possession will not defeat the lien, if that possession is tortiously obtained: *Haughton v. Busch*, 59 N.W. Rep. 621.

The Supreme Court of Arkansas, after discussing the apparently conflicting cases, has arrived at the conclusion that a delivery of liquor to one who promises to return it in kind, is not a "sale," if made in good faith; but if it is a mere subterfuge, it is a sale, within the meaning of the statute: *Robinson v. State*, 27 S.W. Rep. 233. Fairly representative cases are, on the one hand, *Com. v. Abrams*, 150 Mass. 393; S. C., 23 N. E. Rep. 53; and on the other, *Gillan v. State*, 47 Ark. 555; S. C., 2 S.W. Rep. 185. The Supreme Court of Michigan has decided that knowledge that the vendee is selling liquors illegally is no defence to an action by the vendor for the price: *Gambbs v. Sutherland*, 59 N.W. Rep. 652; though a contrary doctrine prevails in Massachusetts: *Graves v. Johnson*, 30 N. E. Rep. 818.

The Supreme Court of Nebraska, which has been making law rapidly of late, has ruled that after a contract of hiring expires, the law does not imply that the after services were rendered on the original contract, so as to exclude parol evidence of different terms: *Hale v. Sheehan*, 59 N.W. Rep. 554. The Court of Civil Appeals of Texas thinks that the legislature has power to declare what class of employés shall thereafter be considered as fellow servants: *Galv., H. & S. F. Ry. Co.*, 27 S.W. Rep. 426; and the Supreme Court of California, that the mate of a ship engaged in carrying freight and passengers between distant points is a fellow servant of a man employed in the steward's department to wait on the officers' table: *Livingston v. Kodiak Packing Co.*, 37 Pac. Rep. 149; though if a mate is not a vice-principal, it will be hard to define the latter term. Yet the House of Lords treats the master of a vessel as a fellow

servant with the seamen: *Hedley v. Pinkney & Sons S. S. Co.* [1894] App. Cas. 222. The Supreme Judicial Court of Massachusetts, however, holds that an employé of a railroad riding to and from work on a free ticket given him by the defendant company, is a passenger, not a fellow servant of the crew, during that ride: *Doyle v. Fitchburg R. R.*, 37 N. E. Rep. 770. The Appellate Court of Indiana has decided, rather at variance with the weight of authority, that when a stone, insecurely placed by the order of a fellow servant in charge of the yard, fell on a workman and injured him, the master was liable for his neglect to provide a safe place to work: *Blondin v. Oolite Quarry Co.*, 37 N. E. Rep. 812; and the Supreme Court of Missouri, that if a railroad neglects its statutory duty to fence its tracks, it will be liable for the death of an engineer due to a collision with a bull that had come on the track through a defect in the fence: *Dickson v. Omaha & St. L. Ry. Co.*, 27 S. W. Rep. 476.

As usual, the subject of mechanics' liens bears its share of fruit. The Supreme Court of Illinois has held, that when a corporation is a sub-contractor, a notice signed by it, or its attorney, without the corporate seal, is sufficient: *Carey-Lombard Lumber Co. v. Fullenwider*, 37 N. E. Rep. 899; the Supreme Court of Washington, that the fact that a person entitled to a mechanics' lien assigns his claim against the owner of the land as collateral security, will not defeat his right to claim the lien, as the assignment is a merely equitable one: *Potvin v. Denny Hotel Co.*, 37 Pac. Rep. 320; and the Supreme Court of Indiana, that in an action to foreclose a mechanics' lien, persons to whom the property was conveyed after record notice of intent to file a lien, and who claim to be owners thereof, are proper parties: *Vorhees v. Beckwell*, 37 N. E. Rep. 811. The Supreme Court of Pennsylvania, in that mania for spying out unconstitutionality that seems to afflict it, has lately decided that an act providing that no contract between the owner and the contractor shall interfere with the right of a sub-contractor to file a lien, unless he agrees in writing to be bound by the contract between the

contractor and owner, is unconstitutional, as an unwarrantable interference with the indefeasible right of acquiring and possessing property: *Waters v. Wolf*, 29 Atl. Rep. 646. This has a very fine sound; but compared with the brief dissenting opinion of Justice Mitchell, it lacks harmony. In his view, the act was nothing more than a regulation of future contracts, one wholly within the power of the legislature. Certainly, it was not as fundamental a disturbance of the right of acquiring and possessing property as the act which declared that no ground rent thereafter created should be irredeemable; or than those imposing collateral inheritance taxes.

The Supreme Court of Louisiana has recently reaffirmed the doctrine, that the legislature may delegate to a municipal corporation power to adopt and enforce ordinances of special and local importance, though general statutes exist relating to the same subject; and that the same act may constitute a crime against the public law of the state, and also a petty offence against a municipal regulation; but that the two offences are different, and either or both may be punished without violating any constitutional right of the party accused: *City of Monroe v. Hardy*, 15 So. Rep. 696.

The United States Circuit Court for the District of Massachusetts, in *In re Saito*, 62 Fed. Rep. 126, has refused to naturalize a native of Japan, on the ground that, being of Mongolian race, he was not included within the term "white person:" Rev. Stat. U. S., § 2169. The same was held as to the Chinese, even before the act forbidding their naturalization: *In re Ah Yup*, 5 Sawyer, 155. The general rule as to the interpretation of the word "white" is, that it includes only those who have over 50 per cent. of white blood in their veins, half breeds being therefore excluded: 2 Kent Com. 72; *Williams v. School Dir.*, Wright (Ohio), 578; *Gray v. State*, 4 Ohio, 353; *Jeffries v. Ankeny*, 11 Ohio, 372; *Thacker v. Hawk*, 11 Ohio, 377; *Lane v. Baker*, 12 Ohio, 237; *In re Frank Camille*, 6 Sawyer, 541; S. C., 6 Fed. Rep. 256. At the same time, a state of affairs that permits

the most degraded negro to vote, but excludes the members of a nation as intelligent as the Japanese, calls loudly for legislative correction.

The Supreme Court of Michigan has decided in *Talmage v. Smith*, 59 N. W. Rep. 656, that when a boy goes on a shed
 Negligence belonging to the defendant, who throws a stick at him and puts out his eye, he can recover, though a trespasser, as he could not anticipate the throwing of the stick; and the Supreme Court of Kansas has ruled that the mere fact that a coal miner, engaged by a mining corporation in sinking a coal shaft, is a small stockholder in the corporation, will not prevent him from recovering damages for a personal injury caused by the negligence of the corporation, as such a stockholder has no personal control or management of the coal shaft, or of the corporation or its property: *Morbach v. Home Min. Co.*, 37 Pac. Rep. 122.

The law of nuisances has received a valuable addition in the careful opinion of the Supreme Court of Nebraska in *Beatrice Gas Co. v. Thomas*, 59 N. W. Rep. 925, which
 Nuisance rejects the fallacious doctrine of *Brown v. Illius*, 27 Conn. 84, and *Ballard v. Tomlinson*, 26 Ch. D. 194, holding that there is a distinction between an injury caused by the percolation of filth through the ground and that due to the contamination of a subterranean watercourse, and follows *Kinnaird v. Oil Co.*, 89 Ky. 468; S. C., 12 S. W. Rep. 937, to the effect that one who collects injurious or offensive matters upon his premises, which by percolation, transmission through subterranean streams or otherwise, pollutes his neighbor's well, is liable for the damages thereby sustained. See *Hauck v. Tide Water Pipe Line Co.*, 153 Pa. 566; S. C., 32 W. N. C. 45; 26 Atl. Rep. 644.

The Supreme Court of Florida holds that a suit cannot be maintained against the sureties on an official bond conditioned
 Officers "for faithful collection of taxes and prompt payment thereof," for fees due a publisher for advertising sales of land for taxes, which had come into the hands

of the officer; such a withholding of money due being official misconduct, but not a breach of the bond: *State v. Montague*, 15 So. Rep. 589. And the Supreme Court of Washington has decided that a board of county commissioners, having power to contract for the services of a county physician, has power to make such a contract for a year, though members of the board are about to go out of office in a few days: *Webb v. Spokane Co.*, 37 Pac. Rep. 282.

According to the Supreme Court of Arkansas the service of a summons by the plaintiff's attorney is void, he not being a disinterested party: *Rutherford v. Moody*, Practice, Civil 27 S. W. Rep. 230; and in the opinion of the Appellate Court of Indiana a motion by the plaintiff for judgment *non obstante veredicto* does not raise the point that judgment should be rendered for the plaintiff on the answers to interrogatories, notwithstanding the general verdict: *Marion St. Ry. Co. v. Carr*, 37 N. E. Rep. 952.

Criminal practice never fails to furnish something new. The Supreme Court of California has decided that when, Practice, Criminal pending a prosecution, the part of the county in which the offence was committed is erected into a new county, such new county has jurisdiction of the offence, the prosecution in the old county having been dismissed: *Peo. v. Stokes*, 37 Pac. Rep. 207; the Supreme Court of Vermont has ruled, that when the statute does not clearly and definitely apprise the defendant of the charge against him, an indictment charging the offence in the words of the statute is insufficient: *State v. Fisher*, 29 Atl. Rep. 633; the Supreme Court of Wisconsin, that it is within the discretion of the court to permit a juror to attend his place of business during a criminal trial: *Baker v. State*, 59 N. W. Rep. 570; the Supreme Court of South Carolina, that if, after the jury has been sworn, a juror states to the court that he has formed and expressed an opinion, it is error to let the trial proceed with that juror: *State v. Cason*, 19 S. E. Rep. 918; and the Supreme Court of Pennsylvania, that when, after a verdict has been announced,

recorded, and affirmatively responded to by the entire jury, the latter is erroneously polled, the separate answers given by the jurors, if not in accord with the verdict, may be treated as surplusage: *Com. v. Schmous*, 29 Atl. Rep. 644.

The Court of Criminal Appeals of Texas has made a decided advance in holding that a new trial should have been granted when, by the voluntary affidavit of a juror, it appeared that the deponent had told the other jurors facts known to him prejudicial to the defendant: *Ellis v. State*, 27 S. W. Rep. 136. This is in direct contravention of the general rule, which invests the verdict with such absurd sanctity, that a juror cannot impeach it, even in cases like the present, though he may testify in support of it: *Taylor v. Com. (Va.)*, 17 S. E. Rep. 812; but the Supreme Court of the United States has held that they can testify to the fact of extraneous influence, but not to its effect: *Mattox v. U. S.*, 146 U. S. 140; S. C., 13 Sup. Ct. Rep. 50. There is no reason for blindly clinging to the old rule; it is as unreasonable as that of *nemo auditur allegans suam turpitudinem*, and should have been exploded with that. The utter absurdity to which it is carried is well shown by a recent decision of the court of Blair county, Pa., that a verdict obtained by the toss of a cent could not be disturbed on the affidavit of a juror to that effect. See *The Philadelphia Record* for Friday, August 31st.

According to the Supreme Court of Illinois, when a note provides for compound interest, but the interest is not secured by coupons, only simple interest is recoverable: *Promissory Notes Rowman v. Neely*, 37 N. E. Rep. 840; and a note given in payment for corporate stock, which recites that the certificate of stock is to be surrendered on payment of the note, is not negotiable: *Van Zandt v. Hopkins*, 37 N. E. Rep. 845.

The Supreme Court of California has decided that a broker's right to commissions for procuring a purchaser for land under an agreement therefor, is not affected by the fact that he knew the principal had title to only five-sixths of the land, on which account the deal fell through: *Real Estate Brokers*

Martin *v.* Ede, 37 Pac. Rep. 199; but the Supreme Court of Michigan has ruled that a real estate agent is not entitled to commissions from the vendee as agreed on, when the agent asked the vendee a price greatly in excess of that fixed by the vendor, and concealed the fact that he had been instructed to sell at the reduced price: Phinney *v.* Hall, 59 N.W. Rep. 814.

In the opinion of the Supreme Court of Pennsylvania, the school board of a city has a right to exclude a pupil who will not submit to be vaccinated during a small-pox scare: *Duffield v. School Dist. of Williamsport*, 29 Atl. Rep. 742; but the Appellate Court of Indiana holds that the board cannot refuse to pay a teacher, employed for a certain time, for the full period, on the ground that the school was closed part of the time by order of the board of health, because of the prevalence of a contagious disease among the pupils, since such closing of the school was not caused by the act of God: *Gear v. Gray*, 37 N. E. Rep. 1059; following *Dewey v. Alpena School Dist.*, 43 Mich. 480; S. C., 5 N. W. Rep. 646.

It is also the opinion of the Supreme Court of Pennsylvania, that when a corporation pays tax on its capital stock, the same stock cannot be taxed again in the hands of the separate holders of the shares: *Com. v. Lehigh Coal & Nav. Co.*, 29 Atl. Rep. 664; while according to the Supreme Court of the United States, a statute, providing that the rolling stock of a railroad shall be listed and taxed in the several counties through which it passes, in the proportion that the length of the main track in that county bears to the main track used and operated by the company, is not invalid, as requiring an assessment of property outside the state: *Pittsb., C. C. & St. L. Ry. Co. v. Backus*, 14 Sup. Ct. Rep. 1114; aff. S. C., 33 N. E. Rep. 432; nor is the assessment of a road partly within and partly without the state, by ascertaining the value of the whole line, and then determining the value of that part within the state, invalid: *Cleveland, C. C. & St. L. Ry. Co. v. Backus*, 14 Sup. Ct. Rep. 1122; aff. S. C., 33 N. E. Rep. 421.

By a recent decision of the Court of Civil Appeals of Texas, a provision on a telegraph message that the company shall be liable only for the cost of transmission, unless the message is repeated, is waived if the sender, some time after sending the message, suggests to the agent that it be repeated, and the agent says that this would be useless, as the message had gone through "all right:" *West. Union Tel. Co. v. Reeves*, 27 S. W. Rep. 318; but the Appellate Court of Indiana holds that a telegraph company is not liable to a penalty for failure to transmit messages impartially, when it inadvertently receives a message for transmission to a point at which it has no office: *Peterson v. West. Union Tel. Co.*, 37 N. E. Rep. 810.

The Privy Council of England has lately rendered an interesting trade-mark decision, on appeal from New South Wales, in *Natl. Starch Mfg. Co. v. Munn's Pat. Maizena & Starch Co.* [1894] App. Cas. 275. The appellants had invented the word "Maizena" for their product in 1856, but had never registered it in the colony until 1889, although they had registered it and enforced it in other countries, and had allowed it to be used as a term descriptive of the general article rather than of their own manufacture. It was accordingly held that the word had become *publici juris*, and could not be registered as a trade-mark; and further, that as the respondents, in applying the word to their own manufacture, did not try to pass it off as that of the appellants, by the use of labels and packets calculated to deceive the public on that point, but on the contrary stated the name of the maker, the place of manufacture, and other necessary particulars, they would not be restrained from using it.

The Supreme Court of Kansas has ruled that when a vendor sells and delivers goods at prices and on terms of payment definitely fixed by the contract, but retains the right to elect to take back the goods remaining unsold by the vendee, as the property of the vendor, the latter is not the owner of the goods until after the actual exercise of such election, and creditors of the vendee, who

(c) But not ordinarily that they are pecuniarily responsible or solvent; for this is a warranting of quality of the article: *Day v. Kinney*, 131 Mass. 37; *Burgess v. Chapin*, 5 R. I. 225.

There is no doubt, therefore, that the article delivered must correspond in species and kind with that sold: *Lamb v. Crafts*, 12 Met. 353.

Some words of quality may be so positive and definite as not to be merely expressions of opinion or recommendation, but words of positive affirmance. In such cases they may be considered as warranties of quality as well as kind: *Forchimer v. Stewart*, 65 Iowa, 593; *Chisholm v. Proudfort*, 15 Up. Can. Q. B. 203.

The maxim of *caveat emptor* is universally adopted in America, save, perhaps, in South Carolina, and therefore, in the sale of an existing specific chattel inspected or selected by the buyer, or subject to his inspection, there is no implied warranty of quality; or, as sometimes stated "a sound price does not in and of itself, import of sound quality." The doctrine of *caveat emptor*, however, has so many limitations that it must be read in the light of what are sometimes called exceptions, but which are really independent rules and principles. The purchaser must examine for himself the article offered to him for sale, and exercise his own judgment respecting it. If he purchases without examination or after a hasty examination, or in mere reliance upon the seller, and the article turns out to be defective, it is his own fault, and he has no remedy against the seller unless the latter expressly warrants the article, or made a fraudulent representation concerning it, or knowing it to be defective, used some art to disguise it. This is the leading maxim of law relating to the contract of sale; and its application is not affected by the circumstance that the price is such as is usually given for a sound commodity; 1 *Smith's Leading Cases*, 78; 2 *Kent's Commentaries*, 478.

It seems to have been originally applicable not to the quality but the title of the goods sold. In modern law, however, the rule is, that if the seller has possession of the article and sells it as his own, and not as agent for another, and for

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. S. Ellis, Esq., 738 Drexel Building, Philadelphia, Pa.]

DIGEST OF INSURANCE CASES, for the year ending October 31, 1893. By JOHN FINCH. Indianapolis: The Rough Notes Co., 1893.

CASES ON CONSTITUTIONAL LAW, with Notes. Part II. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever, 1894.

AMERICAN RAILROAD AND CORPORATION REPORTS, being a Collection of the Decisions of the Courts of Last Resort in the United States pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and annotated by JOHN LEWIS. Vol. VII. Chicago: H. H. Myers & Co., 1893.

THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE. By EDWIN E. BRYANT. Boston: Little, Brown & Co., 1894.

A TREATISE ON DISPUTED HANDWRITING AND THE DETERMINATION OF GENUINE FROM FORGED SIGNATURES, THE CHARACTER AND COMPOSITION OF INKS, ETC. By WILLIAM E. HAGAN, Expert in Handwriting. New York: Banks & Brothers, 1894.

THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM. By MAXIMUS A. LENSER, A.M., LL.B., of the New York Bar. Rochester, N. Y.: The Lawyers' Co-operative Publishing Co., 1894.

THE LAW OF THE MASTER'S LIABILITY FOR INJURIES TO SERVANT. By W. F. RAILLY. St. Paul, Minn.: West Publishing Co.

RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS. By CHARLES CHAUNCEY BINNEY, of the Philadelphia Bar. Philadelphia: Kay & Brother, 1894.

AN ILLUSTRATED DICTIONARY OF MEDICAL BIOLOGY AND ALLIED SCIENCES. By GEORGE M. GOULD, A.M., M.D. Boston: Little, Brown & Co.

A LEGAL DOCUMENT OF BABYLONIA. By MORRIS JASTROW, Ph.D. From the "Oriental Studies" of the Oriental Club of Philadelphia. 1894.

OUTLINE STUDY OF LAW. By ISAAC FRANKLIN RUSSELL, D.C.L., LL.D. New York: L. K. Strouse & Co., 1894.

THE NATURE OF THE STATE. By DR. PAUL CARUS. Chicago: The Open Court Publishing Co., 1894.

THE FOREIGN JURISDICTION OF THE BRITISH CROWN. By W. E. HALL. M. A. MacMillan & Co.: New York, 1894.

PRECEDENTS AND FORMS OF INDICTMENTS, INFORMATION, COMPLAINTS, ETC., ETC., ADAPTED TO PRACTICE IN UNITED STATES CRIMINAL AND CIVIL CASES. Together with Forms and Instructions pertaining to the accounts and fees of U. S. Attorneys and Commissioners. By OLIVER E. PAGIN, Asst. U. S. Attorney for N. D. of Illinois. Chicago: Callaghan & Co., 1894.

We have also received the following pamphlets, etc.:

JEWETT'S MANUAL FOR ELECTION OFFICERS AND VOTERS IN THE STATE OF NEW YORK, containing General Election Law and Town Meeting Law. With Notes, Forms and Instructions. Matthew Bender, Albany, N. Y.

VANDEGRIFT'S HAND-BOOK OF THE UNITED STATES TARIFF, containing the Custom Tariff Act of 1894, etc. F. R. Vandegrift & Co., New York.

REPORT OF THE FIRST ANNUAL MEETING OF THE TERRITORIAL BAR ASSOCIATION OF UTAH. 1894.

of the sample, but only that the bulk must be of the same species or kind as the sample, and also shall be merchantable: *Boyd v. Wilson*, 83 Pa. 319; *West Republic Co. v. Jones*, 108 Pa. 55.

To constitute a sale by sample in the legal sense of the term, it must appear that the parties contracted solely in reference to the sample or article exhibited, and that both mutually understood they were dealing with the sample, with an understanding that the bulk was like it: *Beirne v. Dord*, 5 N. Y. 95; *Day v. Raquet*, 14 Minn. 282.

Or, as sometimes stated, to raise the implied warranty of conformity between sample and bulk, it must appear that the alleged sale by sample was really such; that the portion shown was intended and understood to be a standard of the quality and not merely that it was in fact taken from the bulk. If that was all that was understood, it would not raise the implied warranty. Merely showing a portion of the goods instead of the whole, does not necessarily constitute a sale by sample: *Selser v. Roberts*, 105 Pa. 242; *Proctor v. Spratley*, 78 Va. 254; *Ames v. Jones*, 77 N. Y. 614.

Whether a sale was strictly by sample, or whether the buyer acted on his own judgment is ordinarily a question for the jury: *Waring v. Mason*, 18 Wend. 445.

When implied warranties arise:

(1) In a sale of goods by description there is a double warranty. (a) that the goods shall correspond to the description, and (b) that the goods shall be of a merchantable quality and condition: *Hawkins v. Pemberton*, 51 N. Y. 198; *Walcott v. Mount*, 36 N. J. Law, 262; *Horse v. Union Stock Yards Co.*, 21 Ore. 289; *Murchie v. Cornell*, 155 Mass. 50; *Chalmers's Digest*, § 16.

As to the first proposition, Rogers, J., in *Borrekins v. Bevan*, 3 Rawle, 23, 43, said: "In all sales there is an implied warranty that the article corresponds in specie with the commodities sold. It may be safely ruled, that a sample or description in a sale-note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described, or represented to be by the vendor."

made either by our government with foreign powers, or between different foreign powers, with respect to the rights of this country, beginning with the Treaty of Utrecht between England and France in the year 1713, and ending with the convention for the settlement of the Behring Sea controversy in 1892. Among the treaties included by Dr. Snow in this collection may be mentioned the Treaties of Alliance and of Amity and Commerce, negotiated by Dr. Franklin with the French Government in 1778; the Treaty of Peace, negotiated with Great Britain in 1783; the Jay Treaty of 1794; the Treaty for the Cession of Louisiana of 1803, and the numerous treaties relating to the Canadian fisheries. This volume includes either the full text of, or large extracts from, treaties made at various times by our government with nearly every civilized nation.

Part II of Dr. Snow's book is entitled "Topics in American Diplomacy," and contains a series of three carefully written essays upon the subjects of "The Monroe Doctrine," "The Fisheries Question," and "The Behring Sea Arbitration." Under the first of these three heads he discusses the origin and history of the Monroe doctrine, and points out how it has exerted an influence in bringing about general congresses and international conferences of the various nations of North and South America—such, for instance, as the Panama Congress of 1826, the Congress of Lima of 1847, and the Pan-American Congress of 1889, of which the late Mr. Blaine, who was then our Secretary of State, was president. Dr. Snow also discusses the effect of the Monroe doctrine, at different periods of our history, upon our relations with Cuba, San Domingo, Samoa and the Hawaiian Islands.

His concluding essays upon "The Fisheries Question" and "The Behring Sea Arbitration" contain a succinct account of the manner in which the important questions involved in those famous controversies arose, became the subject of extensive negotiations, and were finally determined, in the one case, by a series of treaties, in the other by the adjudications of an impartial international tribunal.

It is not too much to say that this volume fills a place and

answers a purpose not hitherto covered by any existing work on the subject of international law, and that no library purporting to include the more important law books as they are published from time to time can be regarded as complete without it.

RUSSELL DUANE.

A MANUAL OF THE STUDY OF DOCUMENTS TO ESTABLISH THE INDIVIDUAL CHARACTER OF HANDWRITING, ETC., AND TO DETECT FRAUD AND FORGERY, including Several New Methods of Research. By PERSIFOR FRAZER, Docteur sciences naturelles. Officier de l'instruction publique (France). Correspondent Der K. K. Reichsanstalt Zu Wien, etc. Illustrated. Philadelphia: J. B. Lippincott Company. 1894.

We have read this book in its entirety excepting the last chapter concerning the law relating to the testimony of experts on handwriting, and from such examination we are able to give it our hearty approval. While we cannot agree with the learned author in everything that he has written, and especially with the conclusions to which he arrived in Chapter 7, concerning "The Sequence in Crossed Lines," and Chapter 14, concerning "Composite Photography," we are, however, able to state that the book is written in a thoroughly scientific spirit and method, and is evidently the work of a conscientious writer. It is, so far as we know, the first systematic treatise on this subject, and the author as a pioneer in a difficult subject is entitled to very great credit for the systematic clearness of his exposition.

While it would be impossible for any one by reading this work to become an expert on handwriting, it will subserve a most useful purpose by furnishing lawyers charged with investigation of such subjects, the means of making themselves acquainted with the methods of research adopted by those entitled to call themselves experts.

Considering the fact, that there are several professed treatises upon the law of evidence to be found in every law library, much more exhaustive and better in every respect for lawyers'

use than the abstract of Stevens on Evidence to be found in the last chapter of the author, we do not think that this chapter adds anything to the value of the work.

A careful perusal of this work, will we think do much to disabuse the minds of the profession of law of the distrust so generally entertained by them of expert testimony on handwriting. We commend the book to the careful perusal of the profession.

M. D. EWELL.

The Kent Law School of Chicago.

July 11, 1894.

"THE ART OF WINNING CASES." By HENRY HARDWICKE,
of the New York Bar. New York: Banks Bros. 1894.

The majority of law books deal with the law as a *science*. Most of them are very restricted in their scope, and cover only a very small section of the general subject. In the present volume the author has given us an exposition of the law as an *art*. He tells us not what the lawyer ought to know, but what he ought to do. In the 677 pages of which the book is composed he states a series of rules to guide the attorney in his preparation of a case, in the statement of it to a court and jury, in the examination and cross-examination of witnesses, and in the summing up of evidence preparatory to the securing of a verdict. The work concludes with an appendix containing a number of well chosen selections from the speeches of the great masters of the art of advocacy.

Books of this general character too often deal in obvious generalities instead of giving to the reader those specific and detailed rules and suggestions which afford real assistance to him in his work. From this fault the present volume, with the exception perhaps of a portion of the chapter entitled "Suggestions to Young Lawyers," is uncommonly free. As an illustration of the exceedingly practical and useful character of its suggestions, the following rules, selected at random, may be cited: An attorney in advance of trial should always cross-examine his own witnesses *separately*; he should never take his eye from a witness undergoing cross-examination on the stand; he should examine a doubtful or dishonest witness

rapidly; he should pursue the order of time in stating the testimony of witnesses to the jury; he should always go to trial with a brief of facts at hand as well as a brief of the law.

In preparing this volume the author has drawn upon a very wide area for his materials, and in it he cites the examples of many eminent practitioners in support of the advice and the suggestions which he imparts. Thus he describes Rufus Choate's method of preparing cases for trial, states Scarlett's advice upon the opening of a case to the jury, and makes observations upon the systems followed by such advocates as David Paul Brown and Sergeant Ballantine in the cross-examination of witnesses. References are also made to incidents which have occurred in famous trials, such as that of Queen Caroline, in order to illustrate points made by the author. On questions as to which the opinions of members of the profession differ, for example as to whether it is better to cross-examine a hostile witness gently or harshly, the author gives the arguments which from time to time have been advanced upon both sides. At times, however, the author is given to propounding questions and difficulties to which he does not make any satisfactory answer. Thus, on page 152, he tells us that one of the most dangerous witnesses to deal with is the witness who does not remember, but he is silent as to the manner in which such a witness is to be successfully treated. There are parts of the book also which consist of little more than strings of stories or quotations, which however interesting in themselves are not woven into the thread of the subject dealt with by many observations on the part of the author. The object for which this book was written has, however, most certainly been attained; and there is probably not a single lawyer at the American bar of less than ten years standing who could not try a case much more effectively after reading the work than he could have done before reading it.

RUSSELL DUANE.

A TREATISE ON THE LAW OF BUILDING AND BUILDINGS;
especially referring to Building Contracts, Leases, Easements, and Liens, containing also various forms useful in

building operations, etc., etc. By A. PARLETT LLOYD, of the Baltimore Bar. Second edition, revised and enlarged. Boston and New York: Houghton, Mifflin & Co., The Riverside Press, Cambridge. 1894.

The second edition of this excellent work has just been sent to us for review. Although Mr. LLOYD's work is already favorably known to the profession, in view of the importance of the subject a few words in regard to the method of treatment adopted may not be amiss. Mr. LLOYD treats the subject under four principal titles, building contracts, building leases, easements relating to buildings, and mechanics' liens. Of special interest are the chapters upon the duties and responsibilities of architects and superintendents, performance of building contracts, penalties and liquidated damages, and party walls. The work presents a clear, concise and, so far as we have been able to ascertain, an accurate view of the present condition of the law, and will undoubtedly prove invaluable to the practitioner as a work of ready reference. This by no means implies that, in the estimation of the reviewer, the work is to be regarded as a mere digest of cases. On the contrary, it could with much greater propriety be described as a digest of principles rather than cases. To say as much as this of any work is necessarily to award it a very large measure of praise. On the other hand it should be observed that, in his effort to produce a purely practical work avoiding all useless speculation, the author has failed to trace principles to their origin in a truly scientific spirit, and, therefore, in the opinion of the reviewer, his work not only lacks scientific completeness but in many respects even its practical value is much impaired.

HOWARD W. PAGE.

AN ESSAY ON THE LAW RELATING TO TELEGRAPH COMPANIES.
By EDWARD BROOKS, JR. Lancaster, Pa.: Wickersham
Printing Company. 1893.

Mr. BROOKS's view of the development of "The Law Relating to Telegraph Companies" may be gathered from

the following passages in which (after stating the diverse views of the courts) he justly criticises them for their failure to employ the method of agreement and difference in their efforts to get at the truth. "The trouble lies in the fact that every one who has investigated the subject, has searched among the traditions of the common law for some status to which they could relegate Telegraph Companies. No one has seemed to realize that, in the invention of the telegraph, a new discovery was made, a new method of communication introduced, which would require, in its workings, the application of principles other than those which applied to the then prevailing system. The common law furnishes no status which can strictly be said to be identical with that of a Telegraph Company. These companies stand on their own bases and have a status peculiar to themselves."

The author proceeds to analyze the redundant statements of the courts in the matter of determining the measure of liability of a Telegraph Company. He says, "Notwithstanding the diversity of decisions in regard to the status of these companies, the courts have, with one accord, decided that a Telegraph Company is liable only for want of due care. The first question, therefore, which presents itself for consideration is, what is the meaning of the expression, 'due care?' The question is readily answered. 'Due care' is such diligence in respect to the safe transmission of messages, as Telegraph Companies are required by law to exercise. This answer, however, immediately gives rise to another question, viz.: What degree of care or diligence does the law require? This degree of care has been variously stated by different courts to be 'reasonable care,' 'care and diligence adequate to the business,' 'highest degree of diligence and skill;' but what do these expressions mean? 'These are but the varied forms of expressing the requirement of what is known in law as 'ordinary care,' as applied to an employment of this nature,' says Mr. Justice Foster, in *Fowler v. Tel. Co.*, 80 Me. 381, 388. But the question immediately arises, what is meant by 'ordinary care as applied to an employment of this nature' The answer to this question can only be found by a referen

to some of the more important cases." This citation is a good illustration of the author's critical faculty.

The work is characterized throughout by a clearness of thought and a vigor of statement which make it most interesting and suggestive, and, therefore, valuable. It is an essay as distinguished from a treatise. Mr. Brooks has, however, collected and discussed all of the most important cases, and his classification of the subject is probably, on the whole, the best that could have been adopted in view of the fact that he steadily adheres to his plan of investigating how far existing doctrines and principles must be modified in order to meet the peculiar requirements of the subject. It, therefore, seems natural to discuss successively as he does, "The Status of a Telegraph Company;" "The Liability of a Telegraph Company;" "The Limitation of Liability by Conditions in the Message Blanks;" "The Measure of Damage."

Each of these heads is, of course, elaborately subdivided. The discussion, under the last head, of "Mental Suffering" (page 54) is particularly to be commended. G. W. P.

THE LAW OF EXPERT TESTIMONY. By EVAN B. LEWIS, A.M.,
LL.B., of the Philadelphia Bar. Philadelphia: Rees Welsh
& Co. 1894.

The author states in his preface that "This volume is intended to give a general treatise [sic] on the law of expert testimony, as it is found in the decisions of the various States, together with the common law principles as they are applied in our courts." After a careful examination of this book, we find that, with its good features, it is not only not exhaustive, but it is, in a number of instances which have come to our notice, inaccurate. Thus, on page 32 we find the following: "The general rule is to exclude any writing for comparison. This is the prevailing English common law rule; and one substantially like it prevails in the New England States, Mississippi, Ohio, Kansas, Iowa, Texas, New Jersey and New York."

The author does not seem to be aware of the fact that the

common law rule has been changed by statute in England, and also in many of the United States, including Ohio, New Jersey, and we believe New York. The author does not appear to be consistent in his statements. Thus, upon pages 44 and 50, we find contradictory statements relative to the identification of blood as human. The quotation from the testimony of the witness in the Cronin case on page 46, is incorrect, as we happen to know of our own knowledge.

The work on the same subject by Dr. Henry Wade Rogers is much superior to the work in question, which, as we have stated before, is neither exhaustive nor accurate. A critical study of the English language would have improved the phraseology of the work. See, for instance, the preface and page 19, 14th and 15th lines, and page 27, 3d and 4th lines of the second paragraph.

M. D. EWELL.

The Kent Law School of Chicago.
July 11, 1894.

POCKET MANUAL OF RULES OF ORDER FOR DELIBERATIVE ASSEMBLIES. By Lieut. Col. HENRY M. ROBERT. Chicago: S. C. Griggs & Co. 1894.

This compendious little manual, which has now reached its one hundred and fifth-eighth thousand, richly deserves the success it has achieved. In its own peculiar domain it has no rival. Compared with the antiquated inefficiency of CUSHING, and the dogmatic unreliability of REED, its pages, with their clear definitions and statements of principles, their abundant explanations and full cross references, are as a modern scientific text book, beside those that obtained in our grandfather's days. If there is any doubtful point not elucidated in its pages, the man who can point it out deserves a prize for his keenness of sight. And in spite of this scientific completeness and accuracy, it is withal so simple that misunderstanding of its statements would be inexcusable. With this book in his hand, no chairman can be pardoned for those errors with which we are all so familiar in the deliberations of church and society meetings.

The book is its own best eulogy; but if there is one feature that deserves praise above others, it is the tabular arrangement of motions at the beginning of the work, which gives at a glance the status and requirements of every motion that can be put—questions more puzzling than any others—which alone would render the book not merely invaluable, but indispensable, to any one who would clearly understand the rules of parliamentary practice.

R. D. S.

THE LAW OF REAL ESTATE BROKERS AS DECIDED IN THE AMERICAN COURTS. By STEWART RAPALJE. New York: Baker, Voorhis & Co. 1893.

This little book, in the words of the author, is not put forward as a treatise, but rather as a compilation of the case-law upon the relation of real estate broker and customer. It is clear that it is the broker's book, written from his standpoint, to meet his necessities, settle his doubts, and "deter him from rushing into court with a case." The work is a concise digest of about nine hundred important cases upon the law of principal and agent as applied to real estate transactions. The first part treats of the powers and liabilities of the broker, including his authority to act for and bind his principal. The second and more important part is devoted to the very interesting subject of compensation, particularly the right to commissions and suits for commissions, with special reference to the various defences set up by ingenious customers.

The work, as has been said before, is not a treatise. There is no historical or legal discussion whatever, no attempt to criticise or reconcile conflicting dicta and rules. The text comprises a succession of brief and compact syllabi, joined by the familiar "Thus," "but," "so," "where," etc., with footnotes devoted to citations. An author who believes this form of writing of use to laymen simply deceives himself. A layman's law book must contain full and patient explanations of first principles. The layman is merely bewildered by the best of digests. This work, however, will be of service to the attorney whose practice includes a real estate business, and

to the title and real estate officers of the many trust companies that are fast monopolizing the business of settlements.

W. H. L.

A STUDY OF THE DEGENERACY OF THE JAWS OF THE HUMAN RACE. By EUGENE S. TALBOT, M.D., DDS., Chicago, Ill. Philadelphia: The S. S. White Dental Manufacturing Co. 1892.

THE ETIOLOGY OF OSSEOUS DEFORMITIES OF THE HEAD, FACE, JAWS AND TEETH. By EUGENE S. TALBOT, M.D., DDS. Third Edition.

These two books, which we have examined with much interest, should prove a lasting monument to the industry and learning of their author. The question of degeneracy of the jaws in its relation to the administration of criminal justice was presented in evidence in the case of the People *v.* Prendergast in the City of Chicago, in which case the learned author was called and examined as an expert. It seems to the writer that anyone with unprejudiced mind, examining the statistics so industriously collected by the author, will be compelled to regard his conclusions with respect. To treat such conclusions with ridicule, as was done by some of the alleged experts in this case, is, to take a charitable view, evidence of ignorance. To give these works such a notice as they deserve would occupy too much space; but, among other questions therein considered, we would call particular attention to Chapters X, XI, XII and XIII, respectively, of the work secondly above described, treating upon "Crime," "Prostitution and Sexual Degeneracy," "Moral Insanity," "Pauperism and Inebriety" and "Intellectual Degeneracy."

No practitioner of law called upon to investigate a case in which the alleged criminal presents stigmata of degeneracy as was the case in the Prendergast trial, can afford to pass by this work.

M. D. EWELL.

The Kent Law School of Chicago.

COMMUNICATIONS.

A COMMENT ON DR. BANNISTER'S VIEW OF THE PRENDERGAST CASE.

The most striking feature of Dr. Bannister's article on the Prendergast Case, published in the last number of THE AMERICAN LAW REGISTER AND REVIEW, is its utter failure to touch the vital point in the case. That point, as in every case in which insanity is set up as a defence, was not whether the criminal was insane, but whether he was responsible. A man can be insane and responsible at the same time. The two conditions are not interdependent. It would not necessarily follow, then, that Prendergast was wrongfully punished, even if we admit the jury to have made a mistake in their finding as to his sanity. But Dr. Bannister should also bear in mind that the opinions of experts are by no means conclusive of facts—no opinion can be; and even if the learned doctors who gravely pronounced their dicta on the hypothetical question put, were the polestars of their profession, it does not necessarily follow that the jury who saw and listened to the criminal were not, by very reason of their lack of special training, better fitted to decide impartially. Overfine training in any special department is apt to lead to results that themselves partake of the character of a mild mania. A highbred pointer kept in the city, away from all opportunities to exercise his special powers, has been known, when taken out for a walk, to point a fan or a piece of paper; and the same tendency is unfortunately too apparent in some modern experts.

Before the punishment of Prendergast can be justly impugned, then, these facts must be established. 1. That he was insane, not merely supposed to be, on the strength of hereditary influence, physical condition and erratic action, by men whose business it is to ferret out such facts. 2. That, supposing him to have been insane, that insanity was of a nature to negative his responsibility. On this last question the law and the doctors are, and probably will always be, at war; but fortunately for the welfare of the country, the law has the upper hand.

A SUBSCRIBER.

THE
AMERICAN LAW REGISTER
AND
• REVIEW.

OCTOBER, 1894.

THE PLACE OF ORIGINAL RESEARCH IN LEGAL
EDUCATION.

By GEORGE WHARTON PEPPER.

There appeared in *The Forum* for July, 1894, an admirable paper, entitled "Research the Vital Spirit of Teaching," by President G. STANLEY HALL. "In the days of the old New England farm," says the writer, "where every boy had active duties and was, in a sense, a member of the firm; in the days of the old debating society and the earlier disputation, which from the time of Socrates down to the present century was the chief academic method,—there was far more to develop the active powers of youth than in the academic training which, with the decline of these things, languished until these days of research; and research, for the average man, is doubtless of far greater value for discipline than for discovery." He proceeds to point out that the deeper causes and effects of this movement lie in the fact that individuality is thus developed, and that the method is re-enforced by the newer anthropology, which regards man as two-thirds will, makes effort the highest and most educable part of his nature and thus gives the method

of research itself the highest value, even for lower schools, quite apart from the value of discoveries.

It seems strange that so little attention has been paid to the bearing of such considerations as these upon the subject of legal education, especially in view of the fact that a somewhat heated debate is in progress at the present time with respect to the proper method of law school instruction. The explanation is probably to be found in the fact that the study of law, in this country, is commonly looked upon as a department of education widely separated from all others—the lawyer, with characteristic narrowness, believing himself to be there in a world of his own creation, where no principles of education are recognized save those which he himself evolves. It is assumed that all problems which arise are to be solved with reference to the consideration that the subject to be taught and learned is *law*, instead of with reference to the consideration that the problem is, before all else, an educational problem. It follows from this that almost every lawyer with whom one converses on the subject of legal education is ready to speak *ex cathedra* and, merely in virtue of the circumstance that he is a member of the bar, to pronounce the most positive opinions upon the most difficult educational questions. In New York city, for example, where the contest is fiercest between the so-called "Case-System" and the so-called "Dwight Method," the school which seeks to identify itself with the latter intrenches itself behind a published list of the names of members of the New York Bar who signed the petition for the incorporation of the school—the inference being that they took this step because of a settled opinion favorable to that particular method of instruction. It is indeed true that, considering the efforts which must have been made to obtain signatures, the list is more notable for the names which it does not than for those which it does contain; and it is also true that some of the gentlemen whose names appear on the list attained their present conspicuous positions for reasons other than the profundity of their legal learning. The point insisted on, however, is this: that there is among lawyers a tendency to decide questions of this sort by a mere count of heads and to seek to

vindicate a particular method of instruction by a simple enumeration of the successful lawyers whose legal education was moulded in conformity to it.

Another result of this mode of conceiving the subject is the basis of the selection of teachers of the law. It is often assumed that an eminent judge or a successful advocate or a learned counsellor will unquestionably prove himself the right man to instruct students of law, and to inspire them with a zealous love for the science to which they have sworn allegiance. When a chair is to be filled in a law school, it is far too seldom that the inquiry is made respecting a candidate whether or not he possesses those peculiar qualities which mark the teacher, and it is quite certain that the instances are few indeed in which a selection is made upon the basis of the candidate's ability to stimulate in his students the spirit of research. "For research," says the writer already quoted, "the first need is a professor who not only points, but leads the way. . . . The distance between these men and the routine-lesson-hearing professor is too great to be estimated by any method of psychological measurement yet devised."

Now, it requires but little reflection to convince an open-minded man that if research and research methods have value in any department of education, surely they must attain their maximum value in the law. In legal education research has a positive value as regards discovery entirely apart from its disciplinary value; for it must be remembered that there are few who study law except with the intention of actually engaging, upon graduation, in what is "original work" in its truest sense. The great majority of college men who take, say, a history course, are taking it for its pure educational value, and not with a view to themselves enlisting in the ranks of the historians. Yet, the highest authorities unite in commending the research-method as the method which will, even in such cases, best enable professor and student to attain the desired end. *A fortiori*, is this true in the study of the law, for there every student is fitting himself to take an active part in the development of the law, and, by argument based upon research and investigation, to influence the decision of the cases which e-

dence its growth. It is somewhat discouraging, therefore, to find in a paper recently put forth by the Dean of the New York Law School such a paragraph as the following, in which he shows a lack of appreciation of the general educational value of research, and ignores the peculiar conditions which give it a special value in legal education: "If a young man wishes to learn English history, is he sent to Europe to ransack the archives and study the original documents, or are the works of GREEN and GARDINER and MACAULAY put into his hands? If he wishes to study medicine and surgery, is he kept carefully aloof from the treatises of great medical writers, who have recorded, for the benefit of those living, the abiding results of all past and present study, experience and discovery, and is he furnished with a living patient and a dead subject, that he may learn, by treatment of the one and by dissection of the other, what he may thus acquire from the 'original sources?' BRYCE's *American Commonwealth* is an elaborate treatise upon the government and institutions of this country, gathering together a mass of valuable facts, which the student might have sought out for himself in the 'original sources;' but still it has been welcomed as one of the most important books of the time, and readers by thousands derive instruction from its pages, sadly oblivious of the fact that they are getting their knowledge at 'second hand.' In fact, when one thinks of the enormous mass of 'second hand' knowledge that has been absorbed by the educated classes of Europe and America, in school, in college, or in private reading, the thought is almost appalling." These sarcastic references to the getting of knowledge at "second hand" were called forth by Mr. JAMES C. CARTER's use of that phrase to describe the method of teaching law in which the instructor follows with his class in the roadways made by some text-book writer, explaining as they go the nature of the work which the author has wrought, and "proving" it from time to time by an examination of a few of the cases with which the author was compelled to deal. Mr. CARTER, in using the phrase in question, was pointing a contrast between this method and the so-called "case-system," in which the instructor, turning aside from the royal road

which others have made, leads his class through the wilderness by a way which he himself has explored—instructor and class together grappling with the cases and hewing for themselves a broad path, which is thus, in a real sense, a path of their own making.

Much has been written and more has been spoken about the "case-system." It is, perhaps, useless to multiply words in its behalf—for in any course in which it has been tried it speaks for itself. Under the case-system the materials which are put in the students' hands are the cases which the instructor has selected as the stepping-stone cases in the development of the subject or doctrine under discussion. These cases stand for the stages of development through which the doctrine has passed from the time that its germ first made its appearance until its present proportions were attained. With the facts of the second case, in historical sequence, before him and with the original decision as a precedent, the student is asked to address himself to the problem with which the court was confronted when that second case arose. Step by step he is made to carry the development forward as applied to the facts of the cases as they successively came up—thus entering into the inmost spirit of the opinions of the judges, after, in each case, first endeavoring to form his own. He is thus taught to look upon the law as a living and a growing organism, and to understand that the development is destined still to go on. He is in a position to apply the necessary mental corrective when he reads text-books and treatises such as BLACKSTONE'S, which almost ignore historical perspective and treat legal doctrines in a given form as things recognized in that form *semper, ubique et ab omnibus*. The "genius of the law" ceases to be to him a mere phrase. He realizes that the law grows upon historical and not upon mathematical principles. He is made to perceive how it will grow and develop while he is at the bar. It should seem that no institution which aims at dispensing all that is best in education can long remain in doubt as to which of these two methods shall be adopted in its law school. "The law, for the student, is not merely something to know of, but also something to do; and the method that inures the

student to such mental processes as are to be his very tools of trade when he starts upon his independent career is the method that will best fit him for any responsibility he may assume for his first or his last client."¹ Harvard has pursued this method for a quarter of a century, and Columbia, within a few years, has followed her example. Both have done great things for the cause of legal education in America.

At this point, however, it is proper to recognize that while law is in its essence a science, it is nevertheless, in our day, in some of its aspects a trade. There must, therefore, be *trade schools* where the primary end in view is admission to the bar of some particular city. For such a school the consideration of educational problems is useless. It should be run wholly on business principles. It should follow public opinion and not lead it. Curriculum, location, hours—all should be determined with reference to the convenience of the class of students from whose patronage it is to derive its profits. Except in rare instances such an institution will have little dignity, but it will make money. Here is a picture of the Columbia Law School in the days when its diploma admitted, *ipso facto*, to the New York Bar—when Professor DWIGHT and his method were, perhaps, in the zenith of their fame. "There were, on the average, not more than ten students using the library at one time. The room was usually empty; but just before or after a recitation it was a popular resort. The order was not good, loud conversations—often on politics—were carried on, tobacco was freely used, and there was no place to leave hats or coats. Many of the students never used the library. Those serving in offices hurried to the school just as recitations began, and left the instant they

¹ See "The Dwight Method" by THOMAS FENTON TAYLOR. *HARV. LAW REV.*, vol. 7, p. 203. This admirable article did not come under my notice until this paper was half written. It is a satisfaction to have additional weight given to many of the views here suggested by the circumstance that they have been asserted independently by Mr. TAYLOR. He writes from the point of view of the lawyer who has had a practical experience of the so-called "Dwight Method," and his paper, while calling attention to inherent defects in the system itself, makes it entirely clear why it is that the "Dwight Method" cannot exist apart from a Dwight as its exponent.

were finished. . . . The questions were put quickly and with wonderful tact. . . . No student ever had his "faculties tried in the highest degree," or was ever driven to a standstill. Every student was "encouraged." . . . The final examinations for a degree were oral, and throughout specifically like the recitations."¹

Where, however, a law school is a department of a university the considerations urged in this paper are obviously in place. A university which allows its educational policy in any field to be controlled by the business principles which determine the policy of a trade school, must at once forfeit its right to be considered among the forces which make toward highest education. If a university offers instruction in law, that instruction must be given upon the basis of the best development of educational science. If under existing conditions, when only two eastern law schools conform to this standard, it could be conceived that such a policy would in a particular institution, result in financial loss, then expenses must be cut down by diminishing the corps of instructors—or the school must be closed. "A university cannot temporize, but, despite ulterior considerations, it must strive to furnish the best possible education in the law."

In university law schools, then, research methods must prevail—and it is contended that *the research method of learning law* is substantially identical with the so-called "Case-System," which has been already referred to. Professor KEEXER prefers to give to this system the name of the inductive method of teaching law. This name is suggestive; but I prefer to emphasize the fact that it is the student himself who is the *actor* under this system. Something more is required of him than that he shall put himself in a receptive state. He himself takes the field and actually plunges into the wilderness of the law. If there is a mountain to climb, and if he desires to become an expert climber, the student becomes like one who is not content with studying the admirably clear treatise on mountain climbing contained in the Badminton Library—or even with ascending the peak by a route that has become familiar. He

¹ Harv. Law Rev., Vol. 7, p. 205 *et seq.*

sallies forth with his guide, determined himself to experience the sensations of the explorer, not unmindful of the fact that his ultimate object is not to reach the top of this particular peak but to learn so to climb that he may climb hereafter. The function of a teacher under the "Case-System" in the department, say, of corporation law, or the law of the *quasi* contracts, is precisely analogous to the function of an Alpine guide in the case of an expedition of unusual difficulty. No one who has had the benefit of the services of a guide on such an expedition will object that this method of instruction is not distinguishable from solitary and unaided study.

Of course it may well be that under particular conditions, it is impracticable to adhere exclusively to the "Case-System" in its typical form in all the branches of study. Lack of ability upon the part of an instructor so to manage his class as to push the work forward with the necessary rapidity often makes it necessary to cover a portion of the field by means of text-book study or by "forensic lectures." Sometimes the magnitude of the field and the limited number of hours at the instructor's command induce him to adopt a similar expedient in order that his students may obtain a rounded view of the whole subject. Again it may often be found desirable (as Professor KEENER points out³) to lighten the work of beginners by the use of a text-book during the first year of study, when the student is unacquainted with technical terms and unfamiliar with legal modes of thought. In such cases, however, there is no abandoning of the research method as the normal method to be pursued in the higher legal education. It is therefore absurd to say, as Professor CHASE, the Dean of the New York Law Schools, says in this connection—"and so the DWIGHT method emerges again as the safe reliance when other methods fail." Perhaps, indeed, Professor CHASE must not be taken too seriously; for the circular from which this extract is taken is obviously the advertisement of a particular law school, although it is cast in the form of a discussion of educational methods. Even the language of the passage just quoted—"the safe reliance when other methods fail"—has long ago

³ Yale Law Journal, March, 1892, p. 148.

been appropriated by the writers of advertisements and cannot be used without at once suggesting to the mind that a business enterprise is being forwarded.

The point insisted on, however, is that educational principles recognized in the other departments of institutions which are engaged in the work of higher education must be recognized also in their law schools and that the first duty of a university law school is to set definitely before itself the true educational ideal and then subordinate every other consideration to its attainment.

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TITUS v. POOLE.¹ SUPREME COURT OF NEW YORK, GENERAL
TERM, 1894.

1. *Sale—Express warranty.*

At the time of transfer of bank stock to plaintiff as a part of the price of land conveyed by him, the grantee stated that the bank was organized under the laws of Pennsylvania; that the stock was worth 100 cents on the dollar; and that it was good, high dividend paying stock. Held an express warranty that the stock was worth its face value, and that the bank was duly organized as stated.

2. *Same—Implied warranty.*

Where a paper purporting to be a certificate of stock in a bank legally organized, is sold as such, there is an implied warranty that the certificate is genuine, and what it purports to be.

3. *Same—Evidence.*

In an action for breach of warranty in a contract of sale of bank stock that the bank was solvent, evidence as to the condition of the bank four years after the sale is incompetent, the question involved being the solvency of the bank at the time of the sale.

WARRANTY.

Warranty is a contract of indemnity made by the seller of goods in favor of the buyer, to protect the latter against a failure of one or more terms of the sale and is collateral to the main contract.

Warranty is the same as guaranty, only the latter is made with reference to the solvency of the person.

1. *Consideration.* The contract of warranty, like other con-

¹ Reported in 73 Hun. 383.

tracts, requires a sufficient consideration to support it: *Benjamin on Sales*, § 611.

But an offer to warrant when the parties commence negotiating might be sufficient, although some days elapse before a final consummation of the bargain: *Wilnot v. Hurd*, 11 Wcnd. 584.

A warranty in a printed catalogue of an auction sale would not ordinarily enter into the sale, if the auctioneer at the sale and in the presence of the purchaser distinctly announces that the seller warrants nothing: *Craig v. Miller*, 22 Up. Can. C. P. 349.

Still more obviously the warranty made after a sale has been fully made and completed, and not before promised or understood, is invalid unless there be a new consideration: *Hogins v. Plympton*, 11 Pick. 99; *Bloss v. Kittridge*, 5 Vt. 28; *Towell v. Galwood*, 2 Scan. 24; *Summers v. Vaughan*, 35 Ind. 323; *Morhouse v. Comstock*, 42 Wis. 626.

If a warranty has been promised at the sale, and one is subsequently given, even after the sale is completed, it is not void for want of consideration: *Cole v. Weed*, 68 Wis. 428.

If, however, the warranty be given at any time before the sale be fully completed, it is valid. Thus, when the goods were ordered and delivered, but no price fixed, and afterwards, when the price was finally agreed upon a warranty was given, it was held valid: *Vincent v. Leland*, 100 Mass. 432.

The question of consideration usually arises only in express warranties, as implied warranties always arise, if at all, at the time of sale, hence the consideration always exists; whereas, express warranties may be made before or after the sale, and a slight new consideration will always suffice: *Porter v. Poole*, 62 Ga. 238.

Thus, where the goods were not delivered at the proper time, justifying the vendee in refusing to accept them, and the seller said if the buyer would accept he would warrant them against freezing, this was held binding: *Conger v. Chamberlain*, 14 Wis. 258.

When an agent, by an oral contract, sells and delivers the goods of a disclosed principal, his personal oral warranty of

quality is not a contract independent of the contract of sale, but is a part of it, and one consideration is sufficient to support the sale and warranty: *Johnson v. Trask*, 116 N. Y. 136.

A warranty is an incident only to a completed sale: *Osborne v. Gantz*, 60 N. Y. 540; *Zimmerman v. Morrow*, 28 Minn. 367; *James v. Bokage*, 45 Ark. 284.

It also follows that a warranty given after a sale has been made is void, unless some new consideration be given for the warranty. The consideration already given is exhausted by the transfer of the property in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given: *Roscorla v. Thomas*, 3 Q. B. 234.

2. *A warranty may be either express or implied.* An express warranty is an affirmation by the seller of a material fact concerning the goods sold, made under such circumstances that the buyer has a right to rely upon, and does rely upon them. It is immaterial that the seller did not intend to make a warranty: *Pasly v. Freeman*, 3 Term. Rep. 51; *Hawkins v. Pemberton*, 51 N. Y. 198; *Reed v. Hastings*, 61 Ill. 266.

In order to constitute a warranty upon a sale, it is not necessary that the representations should have been intended by the vendor as a warranty. If the representation is clear and positive—not a mere expression of opinion—and the vendee understands it as a warranty, and, relying upon it, purchases, the vendor cannot escape liability by claiming that he did not intend what his language declared: *Hawkins v. Pemberton*, 51 N. Y. 198; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 265.

Any affirmation of an existing fact, distinctly and positively made, in negotiations for trade is deemed a warranty: *Sweet v. Bradley*, 24 Barb. 549.

A warranty is a collateral undertaking and forms a part of the contract by the agreement of the parties: *Benjamin on Sales*, § 610; and this is essential to its validity: *Vincent v. Leland*, 100 Mass. 432; *Wilnot v. Hurd*, 11 Wend. 584; *Conger v. Chamberlain*, 14 Wis. 258; *Summers v. Vaughn*, 35 Ind. 323; *Bryant v. Crosby*, 40 Me. 9.

If a sale of property is complete and perfect by the terms of

the written contract of sale, a subsequent warranty is void, unless some new consideration be given to support it. A warranty to be effectual must be intended as such by the parties: *Bryant v. Crosby*, 40 Me. 9; *Summers v. Vaughn*, 35 Ind. 323.

The right of a buyer of goods to sue upon the seller's special warranty of their quality, accrues immediately upon the failure of the warranty, without returning the goods, or giving any notice to the seller: *Vincent v. Leland*, 100 Mass. 432.

Where the alleged warranty is oral, it is for the jury under proper instructions from the court, to decide upon the terms of the contract and the existence of the ingredients necessary to constitute a warranty: *Conger v. Chamberlain*, 14 Wis. 258.

3. *No particular form of words is necessary.* Any words which manifest the intent of the parties: *Wilbur v. Cartwright*, 44 Barb. 536; *Chapman v. Murch*, 19 Johns. 290; *Grieb v. Cole*, 60 Mich. 397; *Holman v. Dord*, 12 Barb. 336; *Folger v. Chase*, 18 Pick. 66; *Becman v. Buck*, 3 Vt. 53; *Roberts v. Morgan*, 2 Cow. 438; *Henshaw v. Robbins*, 9 Metc. 83.

Any representation of the state of the thing sold, by the defendant, or direct, express affirmation by him of its quality or condition, showing his intention to warrant, will be sufficient: *Duffee v. Mason*, 8 Cow. 25; *Chapman v. Murch*, 19 Johns. 290.

A warranty will not be implied from loose conversations between the vendor and vendee, in which the vendor may praise his goods, or express his opinion as to their qualities, or the advantages that may result to the vendee from the purchase. No expression of opinion, however strong, would import a warrant. But if the vendor affirms a fact, as to essential qualities of the goods it amounts to an express warranty: *Henshaw v. Robbins*, 9 Metc. 83.

The expression of an opinion by the seller that logs sold will yield a certain amount of merchantable lumber, is not a warranty, where the buyer examines for himself: *Fannetrey v. Wilcox*, 80 Ill. 477; *Byrne v. Jansen*, 50 Cal. 624.

A representation involving a question of law is necessarily an opinion: *Duffany v. Ferguson*, 66 N. Y. 482.

In *Baker v. Hendrickson*, 24 Wis. 509 the purchaser of trees

saw them taken from the ground, and packed after long exposure. The seller assured him that they would not suffer after long exposure to the air before they were packed. Upon these facts it was held that there was no warranty. *Dickson, C. J.*, said, "It is obvious that they were but mere expressions of opinion, not intended as a warranty, nor so understood. So in *Carondelet Iron Works v. Moore*, 78 Ill. 571, the description of iron sold as mill iron, was held no warranty that it was such, but a mere opinion, because the buyer had examined it before contracting: *Falkner v. Lane*, 58 Ga. 116; *Robinson v. Harvey*, 82 Ill. 58; *Bryan v. Crosby*, 40 Me. 9; *Lindsey v. Davis*, 30 Me. 406; *Bond v. Clark*, 35 Vt. 577.

It is not always easy to determine whether certain language does or does not imply a warranty. Much will depend upon the situation of the parties and the condition of things when the language is used, and to which it will apply. It is certain that the word warrant need not be used, nor any other of precisely the same meaning. It is enough if the words actually used impart an understanding on the part of the owner that the chattel is what it is represented to be, or an equivalent to such understanding: 1 *Pars. Cont.* 463; *Roberts v. Morgan*, 2 Cowen, 438; *Mason v. Chappell*, 15 Grat. 572; *Warren v. Philadelphia Coal Co.*, 83 Pa. 437; *Thorne v. McVeigh*, 75 Ill. 81; *Patrick v. Leach*, 80 Neb. 530.

Every affirmation at the time of the sale of personal chattels amounts to a warranty. This seems to be now settled, notwithstanding the old case of *Chadler v. Lopus*, Cro. Jac. 4, as to the sale of Bezoar Stone. It was so decided in *Osgood v. Lewis* and *Berrikins v. Beran*, 3 Rawls, 23, and in *Powder v. Barham*, 4 Adolp & Ellis, 473, and even in New York, where, in other respects, the doctrine of *Chandler v. Lopus* is adhered to. It has been held, nevertheless, that any representation of the thing sold, or direct affirmation of its quality and condition, showing an intention to warrant, is sufficient to amount to an express warranty: *Chapman v. Mursch*, 19 Johns. 290; *Sweet v. Colgate*, 20 Johns. 196.

In the case of *Warren v. Philadelphia Coal Co.*, it was held, "no special form of words is necessary. The word warrant,

though it is the one generally used, is not so technical that it may not be supplied by others:" See *Legett v. Sands Ale Brewing Co.*, 60 Ill. 158; *Wheeler v. Read*, 36 Ill. 81.

If a party makes representations which amount to a warranty, he cannot avoid their effect by showing that he did not intend to warrant: *Smith v. Justice*, 13 Wis. 600.

Some of the older Pennsylvania cases are very strict in their requirements as to the language that will constitute a warranty. In *Weatherill v. Neilson*, 20 Pa. 448, soda-ash was sold, the seller's agent representing it, as he was authorized to do, to contain "48 per cent. English test." The court refused to admit testimony to show that the ash was far below 48 per cent. English test, and this was sustained on writ of error on the ground that there was nothing in the representations of the agent, or the authority given him, to justify a finding of warranty.

4. *If the affirmation alleged to be a warranty is in writing and is unambiguous, the construction of the contract is for the court:* *Edwards v. Marcy*, 2 Allen, 486, 490; *Henshaw v. Robbins*, 9 Metc. 83; *Rice v. Codman*, 1 Allen, 377; *Berrkins v. Brvi*, 3 Rawle, 23; 1 *Thompson on Trials*, § 1196; *Daniels v. Aldrick*, 42 Mich. 58.

When the meaning of the terms used in a written contract is ascertained, the effect and interpretation of the instrument are to be determined by the court, as a matter of law, and cannot be changed or controlled by evidence of the understanding of the parties or the community: *Hutchinson v. Booker*, 5 M. & W. 535; *Rice v. Codman*, 1 Allen, 380.

When a bill of parcels is given upon a sale of goods describing the goods, or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be. And this rule applies, though the goods are examined by the purchaser at or before the sale, if they are so prepared and present such an appearance as to deceive skillful dealers: *Henshaw v. Robbins*, *supra*.

5. *If the affirmation is ambiguous, it is a question for the jury whether the parties understood it as a warranty or mere*

expression of opinion, commendation, or praise: 1 *Thompson on Trials*, § 1197, 98; *Cook v. Masley*, 13 Wend. 277; *Edwards v. Marcy*, 2 Allen, 486.

"A warranty may be oral or written. When it is reduced to writing it is the province of the court to expound it; but when it is merely verbal, it is for the jury to interpret the words of the witness who testifies concerning it. The court may explain to the jury what constitutes a warranty, when it rests altogether on oral proof; but as no particular form of words is essential and it is mostly a question of intention of both the vendor and vendee, that question, like any other question of fact, must be left to the jury:" *Lindsey v. Davis*, 30 Mo. 406-420.

The rule is, that whenever the vendor, at the time of sale, makes an assertion or representation, respecting the kind, quality or condition of the thing sold, upon which he intends that the vendee shall rely, and upon which the vendee does rely in making the purchase, it amounts to a warranty: *Lamme v. Gregg*, 1 Metc. 144; *Smith v. Miller*, 2 Bibb. (Ky.) 617; *Duffie v. Mason*, 8 Cowen, 25; *Vernon v. Keyes*, 8 East. 632-639; *Morrill v. Wallace*, 9 N. H. 111; *Foggert v. Blackweller*, 4 Ired L. (N. C.) 238.

If, however, the vendor, by what he says, merely intends to express an opinion or belief about the matter, and not to make an affirmation of the fact, the statement will not amount to a warranty: *Henson v. King*, 3 Jones (N. C.), 419; *Rogers v. Acherman*, 22 Barb. 134; *Osgood v. Lewis*, 2 Harr. & G. (Md.) 485; *Bond v. Clark*, 35 Vt. 577; *Thornton v. Thompson*, 4 Grat. (Va.) 121.

6. *If the contract of sale is in writing, no oral warranty can be shown to vary its terms*: *Benjamin on Sales*, § 621; *Watson v. Roode*, 30 Neb. 264.

This results from the general rule of evidence that no new terms can be added by parol to vary a contract which the parties have reduced to writing: *Frost v. Blanchard*, 97 Mass. 155; *Whitmore v. South Boston Iron Co.*, 2 Allen, 58; *Wilner v. Whipple*, 53 Wis. 298-304; *Shepherd v. Gilroy*, 46 Iowa, 193.

In *Merriam v. Fields*, 24 Wis. 640, 642, the written con-

tract contains certain express warranties. Parol evidence was offered to establish certain other warranties, but the court rejected it, saying that the writing was presumed to express the whole contract as to warranties, and could not be varied or added to by parol; See, also, *Mullain v. Thomas*, 43 Conn. 252.

But parol evidence is admissible to explain a written warranty, for where the sale was by sample, parol evidence was admitted to determine whether the article tendered was equal to the sample: *Hogins v. Plymton*, 11 Pick. 97. And, where the sale was by description, evidence was admitted to determine whether the article delivered answered to the description: *Stoop v. Smith*, 100 Mass. 134.

If the article is sold by a formal written contract, or a regular bill of sale, which is silent on the subject of warranty, no oral warranty made at the same time, or even previously, can be shown, since the writing is conclusively presumed to embody the whole contract. For the same reason no additional warranty can be engrafted on or added to one that is written: *Lamb v. Crafts*, 12 Met. 353; *Reed v. Wood*, 9 Vt. 286; *Boardman v. Spooner*, 13 Allen, 253; *Dean v. Mason*, 4 Conn. 432; *Frost v. Blanchard*, 97 Mass. 155; *McQuaid v. Ross*, 77 Wis. 470; *DeWitt v. Berry*, 134 U. S. 312; *Eighmie v. Taylor*, 98 N. Y. 288; *Jones v. Alcy*, 17 Minn. 292.

Thus, where the written warranty was only to the age and soundness of a horse, oral statements as to his "docility" were held not admissible: *Mullain v. Thomas*, 43 Conn. 252.

A written warranty, gratuitously given after a sale, and therefore void, will not limit an oral and different one given at the time of the sale: *Altman v. Kennedy*, 33 Minn. 339.

7. A general warranty does not usually extend to patent and obvious defects, but such defects may be made the subject of the warranty, if the party so intends: *Benjamin on Sales*, 616, 618; *Hill v. North*, 34 Vt. 604; *Williams v. Ingram*, 21 Tex. 300; *McCormick v. Kelly*, 28 Minn. 137; *Bennett v. Buchen*, 76 N. Y. 386.

But it is conceived that if obvious defects are not covered by a general warranty it is simply from the presumption that the

buyer does not rely upon it, which is an essential element to make any warranty binding. In the nature of things, one cannot rely upon the truth of that which he knows to be untrue, and to a purchaser fully knowing the facts in respect to the property, misrepresentation could not have been an inducement or consideration for the purchase, and hence could not have been a part of the contract. But there seems to be no good reason why a warranty may not cover obvious defects as well as others, if the vendor is willing to give it, and the buyer is willing to buy defective property on the assurance of the warranty. If he relies on his own judgment alone, he does not rely on his warranty; if he relies on the warranty alone or in part, he is not without remedy because the infirmities are apparent: *Pinney v. Andrews*, 41 Vt. 631; *First Nat'l Bank v. Grindstaff*, 45 Ind. 158; *Fletcher v. Young*, 69 Ga. 591.

"It is absolutely true, in regard to implied warranties, that no implication of warranty arises when the defect is obvious to the senses, because such defects are, or should be known to the buyer; but the rule may be different as to express, especially as to written warranties specially covering the defect. Such contracts are to be construed most strongly against the warrantor; and, for ought that is known, the warranty was demanded and given expressly to cover existing and known defects. Evidence that the defect was obvious and known to the buyer and so excepted from the operation of the warranty, which in terms is broad enough to cover it, is apparently no less than limiting a written contract by parol agreement. In the one case, the written contract is limited from a mere inference from the facts; in the other, it is controlled by the oral agreement of the parties; in both, the written contract is altered and an effect is given to it different from its obvious meaning on its face. But, if a warranty never covers an obvious defect the rule does not apply unless *the extent*, as well as the mere existence of the disease or defect is also known to the purchaser. If the want of a tail or an ear or a leg of a horse is not covered by a general warranty, yet a defect in the eye, for instance, or a splint on the leg, though visible, may

afterwards prove to be so serious as to be covered by the warranty:" *Shewalter v. Ford*, 34 Miss. 417.

The defect, to be obvious, must be discernible by an ordinary observer examining the property with a view to purchase and not one requiring special skill to detect it: *Birdseye v. Frost*, 34 Barb. 367; *Thompson v. Harvey*, 86 Ala. 522; *Drew v. Ellison*, 60 Vt. 401; *Vates v. Cornelia*, 59 Wis. 615.

Of course, if the seller uses some artifice, conceals defects otherwise visible, or misrepresents a character, his general warranty may cover them: *Kenner v. Harding*, 85 Ill. 264; *Chadsey v. Greene*, 24 Conn. 562.

A temporary and curable injury, existing at the sale, but which does not at the time injuriously affect the natural usefulness and fitness of a horse for service, even if it be a fault, is not a breach of warranty of soundness: *Roberts v. Jenkins*, 21 N. H. 116. In *Korngay v. White*, 10 Ala. 255, it was held that any disease, which effects the value of the animal, whether permanent or temporary, is an unsoundness. Approved in *Roberts v. Jenkins*, 21 N. H. 119. But, whether this be so or not, it is clear that disease need not be incurable, in order to be an unsoundness: *Thompson v. Bertrand*, 23 Ark. 731.

Lameness may or may not be unsoundness. If permanent, it is; if only accidental and temporary, it is not: *Browne v. Bigelow*, 10 Allen, 242.

Ordinarily, a warranty is understood to apply only to the state of things existing at the very time of the sale: *Miller v. McDonald*, 13 Wis. 673; *Leggett v. Sands Ale Co.*, 60 Ill. 158; *Bowman v. Clumer*, 50 Ind. 10.

8. *Warranties by agents.* Auctioneers, known to be such, have not ordinarily authority to warrant and bind the owner. *Blood v. French*, 9 Gray, 198; *Schell v. Stephens*, 50 Mo. 175; *Court v. Snyder*, 28 N. E. Rep. 718; *Dodd v. Farlow*, 11 Allen, 426.

And generally, it may be said, that a mere special agent "to sell," has not, in the absence of any express authority, or any usage or custom to that effect, power to warrant and bind the principal in a sale of an article open to inspection: *Coolcy v. Perrine*, 41 N. J. Law, 322; *Smith v. Tracey*, 36 N. Y. 79.

State v. Fredericks, 47 N. J. Law, 469; *Herring v. Shaggs*, 73 Ala. 446.

If the articles are usually warranted when sold by the owner, it may be that an agent to sell may be supposed to have authority to warrant, and to sell in the usual way: *Ahern v. Goodspeed*, 72 N. Y. 108; *Mayor v. Dean*, 115 N. Y. 557; *Kircher v. Conrod*, 9 Mont. 191.

In sales "by sample," it may be that an agent has implied authority to warrant that the property shall be equal to the sample: *Nelson v. Cowing*, 3 Hill, 330; *Randall v. Kehler*, 60 Me. 47.

But in sales "by sample," the law implies a warranty of similarity, whether the agent does or does not expressly warrant it. This will be more fully treated of under the subject of implied warranties.

In *Upton v. Suffolk County Mills*, 11 Cush. 586, a valuable case, it was distinctly held that a general selling agent, in the absence of any usage or custom to that effect, has no authority to warrant that the flour sold by him shall keep sweet during a sea voyage from Boston to San Francisco, in which it must twice cross the equator. And in *Palmer v. Hatch*, 46 Mo. 585, it was held that an agent to sell whiskey had not authority to warrant against its seizure for former violation of revenue laws. Some American courts certainly seem to hold that a general agent to sell has power to warrant, without any express authority or any custom or usage to that effect, unless he is positively forbidden to warrant: *Deming v. Chase*, 48 Vt. 382; *Murray v. Brooks*, 41 Iowa, 45; *Bierhause v. Talmage*, 103 Ind. 270; *Flatt v. Osborne*, 33 Minn. 98.

But since a warranty is confessedly no natural or necessary part of a contract of sale, but only a collateral or independent agreement, though given, of course, on the occasion of a sale, it is difficult to see where the agent gets such authority unless expressly or impliedly from the principal, or how a mere authority "to sell" gives power to make another contract, not a necessary or usual part of "selling:" *Wait v. Bone*, 123 N. Y. 604.

Of course, an unauthorized warranty of an agent may be

ratified; but a mere receipt of the proceeds of the sale by the principal, in ignorance of an unauthorized warranty, will not be a ratification: *Smith v. Tracey*, 36 N. Y. 79; *Combs v. Scott*, 12 Allen, 493.

As to what circumstances will be sufficient evidence of an authority to warrant by an agent, see *Smith v. Hobbs*, 64 N. H. 75; *Churchill v. Palmer*, 115 Mass. 310; *Eadie v. Ashbaugh*, 43 Iowa, 519; *McIby v. Osborne*, 33 Minn. 492.

Implied Warranty may be implied from the acts of the parties or from custom or usages, or may be created by operation of law. The warranty of title is the most sweeping, as by a contract of sale the seller impliedly warrants to sell the goods as absolute owner free from liens and charges, unless the circumstances of the sale show that the seller is transferring only such property as he may have in the goods; *Chalmers's Digest*, § 616; *Dorr v. Fisher*, 1 Cush. 273; *Merriden National Bank v. Galland*, 120 N. Y. 298.

Implied warranties are created by law, or spring from facts arising at the time of sale, from what the parties did rather than what they said. They are contracts to be sure, but silent contracts, and certain rules prevail as to their existence, or non-existence. No implied warranty of quality ordinarily arises where there is an express warranty of some other quality. The demand by the buyer, for one warranty, is supposed to indicate an intention to desire no other. "*Expressio unius est exclusio alterius*." This is especially enforced where the express warranty is in writing: *Jackson v. Langston*, 61 Ga. 392; *Baldwin v. VanDeusen*, 37 N. Y. 487; *McGraw v. Fletcher*, 35 Mich. 104; *Mullain v. Thomas*, 43 Conn. 252; *DeWitt v. Berry*, 134 U. S. 313; *Chandler v. Thompson*, 30 Fed. Rep. 38.

But it has been thought in South Carolina that an express warranty of quality does not exclude the implied warranty of title, nor *vice versa*, and that they can subsist together; one a contract by law, the other by the parties: *Trimmier v. Thompson*, 10 S. C. 164; *Wells v. Spears*, 1 McCord, 421.

1. *Title*. It is universally agreed in America also, that in every sale of personal property by one in possession thereof,

selling in his own right as absolute owner, there is an implied warranty of ownership, making him liable if it be not so, whether he made any express assertion of ownership or not, or whether he knew of any defects in his title or not; the sale itself is an assertion of ownership. This applies to sales of incorporeal property, rights, and choses in action, as well as chattels: *Marshall v. Duke*, 51 Ind. 62; *Lindsay v. Lamb*, 24 Ark. 224; *Thurston v. Spratt*, 52 Me. 202; *Shattuck v. Greene*, 104 Mass. 42; *Wood v. Sheldon*, 42 N. J. Law, 421; *Krumhaar v. Birch*, 83 Pa. 426; *Giffen v. Baird*, 62 N. Y. 229; *Gookin v. Graham*, 5 Humph. (Tenn.) 480.

This implied warranty of title exists although the vendor signs and delivers to the buyer the bill of sale under which he himself acquired his chattels, which is silent on the subject of warranty: *Shattuck v. Green*, 104 Mass. 102.

If his own bill of sale had contained an express warranty of title, and he had assigned the same to his vendee with all the conditions therein described that might amount to an express warranty on his part: *Long v. Anderson*, 62 Ind. 537.

Of course, a warranty of title is a warranty of a free and perfect title; and is broken by any prior incumbrances, mortgages, pledges or liens on the property: *Dresser v. Ainsworth*, 9 Barb. 619.

And whatever amount the vendee may be obliged to pay the prior incumbrances, he can recover of his vendor, or deduct it from the price, if he has not paid for the goods: *Sargent v. Currier*, 49 N. H. 310; *Harper v. Dotson*, 43 Iowa, 232.

If vendor is in possession there is always an implied warranty, if out of possession there is none: *Scranton v. Clark*, 39 N. Y. 220; *Meriden Nat'l Bank v. Callandet*, 120 N. Y. 299.

All agree that by possession is not meant actual custody, occupation or physical keeping, but includes all constructive possession, such as possession by bailee, or agent of the vendor, etc., the word possession, must have a broad construction: *Whitby v. Haywood*, 6 Cush. 82; *Shattuck v. Green*, 104 Mass. 45.

In New York, the warranty is not broken until the buyer is

reject it unless within the circle: *East Coventry Election*, 377. But the most hopeless conflict is over ballots marked as in the sixth instance in the case under discussion, both after the name of the party and the name of a candidate of another party. Common sense would indicate that the voter intended to vote for that candidate, at any rate, and such has been the decision in some cases: *Weidknacht v. Hawk*, 13 Pa. C. C. 41; *Twentieth Ward Election (No. 2)*, 3 D. R. 120. Legal acumen, however, which is not necessarily synonymous with law, in its boasted capacity of the perfection of human reason, would have it different, and would reject the vote for that office altogether: *In re Election Instructions*, 2 D. R. 1.

In marked contrast with this futile splitting of hairs and consequent nullification of the legislative intent, is the admirable decision in *Woodward v. Sarsons*, 10 L. R. C. P. 733, which holds that the main object of the ballot acts is to secure the carrying out of the intent of the voter, and that anything that goes to show that intent clearly is a valid marking; and that therefore ballots marked with two crosses, or three, instead of one, with a single stroke, a straight line, a mark like an imperfect P added to the cross, a star, a blurred or ill-marked cross, a pencil line through the names of candidates not voted for, a cross to the left of the name, and even a ballot paper torn in two longitudinally down the middle, are good. A comparison of the lucid opinion in which this doctrine was asserted with the abortive efforts at special pleading in the cases cited above makes one blush for his country. One American judge, however, has been found with sufficient judgment to approve this decision, and to assert, expressly on its authority, that a ballot without cross marks, but with the names of candidates erased with lead pencil, was to be counted for those whose names were not erased: *Coleman v. Gernet*, 14 Pa. C. C. 578; *S. C.*, 3 D. R. 500.

The Circuit Court of Appeals, Fifth Circuit, has recently decided a very interesting point of law in *Mitchell v. Marker*, 62 Fed. Rep. 139, to the effect that a carrier by elevator, though not an insurer of the safety of his

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passengers, is yet bound to exercise the highest degree of care, as a carrier by railway or stage coach; that this rule applies not only to the vehicle and machinery, but to the control and management of the means of transportation; and that it is the duty of the person who operates the elevator to give passengers a reasonable time to obtain a balance on entering the car, before beginning a sudden and rapid upward movement, having a tendency to disturb the equilibrium of one yet in motion.

In the opinion of the Superior Court of New York City, pictures painted on canvas, and cemented to the ceiling, are fixtures, and are subject to the lien
 Pictures of a mortgage on the building: *Cohn v. Henscy*, 29 N. Y. Suppl. 1107.

According to the Supreme Court of South Carolina, when a debtor, with intent to defraud his creditors, compromises claims
 Fraud with his debtors, who have no knowledge or notice of such fraudulent intent, the compromise will not be set aside: *Anderson v. Pilgram*, 19 S. E. Rep. 1002.

The Supreme Court of California has added itself to the list of those courts which hold, in contradiction of every principle
 Game Laws of reason and justice, that a statute, prohibiting the sale of game out of season, applies to game brought from without the state, with the exception of that sold in the original package: *Ex parte Mair*, 37 Pac. Rep. 402. This train of decision was set on foot by Chief Justice Coleridge, in *Whitehead v. Smithers*, 2 C. P. D. 553, on the totally inadequate ground that "it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter as well as of protecting other British interests, is by interfering directly with the proceedings of foreign persons. The object is, to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad." But unhappily for his lordship, no ordinary man would ever suspect that fact from the wording of the act.

discharged in his possession: *Bart v. Dewey*, 40 N. Y. 283; *Bardwell v. Colley*, 45 N. Y. 494.

In this country there is also an implied warranty of *identity*, viz.: that the articles shall be of the kind or species it purports to be, or is described to be; that is, that the article delivered shall be the same thing contracted for. This, in England, is called an implied condition; in America, an implied warranty. In the former country it is called a condition, because the vendee has more right of return in case of breach of condition than he has for breach of warranty, and so it is more favorable for him to hold it a breach of condition. But, as there is in America a generally recognized right of return for breach of warranty, as well as for breach of condition, the practical difference between the two countries is slight.

Warranty of genuineness in the sale of commercial paper comes under this head; a warranty that it really is what it purports to be—a real note, and not a false one. On every such sale the vendor impliedly guarantees (a) that the signatures to the paper are genuine, and not forged: *Herrick v. Whitney*, 15 Johns. 240; *Thrall v. Newell*, 19 Vt. 202; *Washington v. Colrs*, 112 Mass. 30; *Ross v. Terry*, 63 N. Y. 613; *Ward v. Haggard*, 75 Ind. 381. Though, of course, no such warranty is implied when the vendor at the sale expressly refuses to warrant the genuineness: *Bell v. Dagg*, 60 N. Y. 528. The doctrine of *Baxter v. Durand*, 29 Me. 434, and *Fisher v. Riccan*, 12 Md. 497, that this implied warranty of genuineness of signature does not apply where a note is sold in market, like other goods and effects as an article of merchandise, but only where it passes in payment of a debt, can hardly be supported. In both cases alike, the thing transferred is not what it purports to be, but only a semblance of it. It is not a question of quality, but of kind or species. It is not a contract at all, if forged. And as goods and chattels sold must conform to their name and description, and be what they purport to be, so must a note: *Hussey v. Libbey*, 66 Me. 192; *Merriam v. Walcott*, 3 Allen, 258.

(b) That the signers are competent to contract, and not ruiners, &c.: *Loddell v. Baker*, 1 Met. 192.

(c) But not ordinarily that they are pecuniarily responsible or solvent; for this is a warranting of quality of the article: *Day v. Kinney*, 131 Mass. 37; *Burgess v. Chapin*, 5 R. I. 225.

There is no doubt, therefore, that the article delivered must correspond in species and kind with that sold: *Lamb v. Crafts*, 12 Met. 353.

Some words of quality may be so positive and definite as not to be merely expressions of opinion or recommendation, but words of positive affirmance. In such cases they may be considered as warranties of quality as well as kind: *Forchheimer v. Stewart*, 65 Iowa, 593; *Chisholm v. Prondfort*, 15 Up. Can. Q. B. 203.

The maxim of *caveat emptor* is universally adopted in America, save, perhaps, in South Carolina, and therefore, in the sale of an existing specific chattel inspected or selected by the buyer, or subject to his inspection, there is no implied warranty of quality; or, as sometimes stated "a sound price does not in and of itself, import of sound quality." The doctrine of *caveat emptor*, however, has so many limitations that it must be read in the light of what are sometimes called exceptions, but which are really independent rules and principles. The purchaser must examine for himself the article offered to him for sale, and exercise his own judgment respecting it. If he purchases without examination or after a hasty examination, or in mere reliance upon the seller, and the article turns out to be defective, it is his own fault, and he has no remedy against the seller unless the latter expressly warrants the article, or made a fraudulent representation concerning it, or knowing it to be defective, used some art to disguise it. This is the leading maxim of law relating to the contract of sale; and its application is not affected by the circumstance that the price is such as is usually given for a sound commodity; 1 *Smith's Leading Cases*, 78; 2 *Kent's Commentaries*, 478.

It seems to have been originally applicable not to the quality but the title of the goods sold. In modern law, however, the rule is, that if the seller has possession of the article and sells it as his own, and not as agent for another, and for

a fair price, he is understood to warrant the title: *2 Kent's Commentaries*, 478; *Ryan v. Ulmer*, 108 Pa. 332; *Bryant v. Pumbler*, 45 Vt. 487; *Hadley v. Clinton, etc., Co.*, 13 Ohio, 503; *Day v. Poole*, 52 N. Y. 416; *Drew v. Rax*, 41 Conn. 50; *Morris v. Thompson*, 85 Ill. 16; *Bowman v. Clemmer*, 50 Ind. 10; *Richardson v. Benck*, 42 Iowa, 185; *West v. Cunningham*, 9 Porter (Ala.), 104; *Johnson v. Powers*, 65 Cal. 181.

In South Carolina, from the earliest time, it has been held that "selling for a sound price raises, in law, a warranty of soundness to the seller." The earliest reported cases being: *Finnrod v. Shoulbred*, 1 Bay, 324; *Crawford v. Wilcox*, 2 Mill, 353; *Putwinkle v. Cramer*, 27 S. C. 376.

Where the parties have not an equal opportunity of examination, but the seller has the better, or where the buyer relies on seller's skill, knowledge, or experience, the risk of quality falls on the seller, and he is said to warrant impliedly the quality of the goods sold.

In sales actually made by sample there is an implied warranty that the bulk shall be of equal quality to the sample: *Hughes v. Gray*, 60 Cal. 284; *Wilcox v. Howard*, 51 Ga. 298; *Whester v. Granger*, 78 Ill. 230; *Afyer v. Wheeler*, 65 Iowa, 390; *Proctor v. Spratley*, 78 Va. 254; *Osborne v. Gantz*, 60 N. Y. 540.

In sales by sample there is no warranty that there is no latent defect in the sample or in the bulk; they must be alike, but neither of them need be perfect. We speak of sellers merely; whether it be otherwise or not as to manufacturers, we will examine later; *Bradley v. Manly*, 13 Mass. 139.

But there may be an express warranty of quality in goods sold by sample as well as in other cases, and in such instances a breach of the warranty of quality is actionable, although the goods might be equal to the sample: *Goold v. Stein*, 149 Mass. 570.

In *DeWitt v. Berry*, 134 U. S. 306, it was held that no implied warranty of quality exists in sales by sample. Pennsylvania, however, has a modified rule on this subject, holding apparently that an ordinary sale by sample does not imply any warranty that the quality of the bulk shall be the same as that

of the sample, but only that the bulk must be of the same species or kind as the sample, and also shall be merchantable: *Boyd v. Wilson*, 83 Pa. 319; *West Republic Co. v. Jones*, 108 Pa. 55.

To constitute a sale by sample in the legal sense of the term, it must appear that the parties contracted solely in reference to the sample or article exhibited, and that both mutually understood they were dealing with the sample, with an understanding that the bulk was like it: *Beirne v. Dord*, 5 N. Y. 95; *Day v. Raquet*, 14 Minn. 282.

Or, as sometimes stated, to raise the implied warranty of conformity between sample and bulk, it must appear that the alleged sale by sample was really such; that the portion shown was intended and understood to be a standard of the quality and not merely that it was in fact taken from the bulk. If that was all that was understood, it would not raise the implied warranty. Merely showing a portion of the goods instead of the whole, does not necessarily constitute a sale by sample: *Selser v. Roberts*, 105 Pa. 242; *Proctor v. Spradley*, 78 Va. 254; *Ames v. Jones*, 77 N. Y. 614.

Whether a sale was strictly by sample, or whether the buyer acted on his own judgment is ordinarily a question for the jury: *Waring v. Mason*, 18 Wend. 445.

When implied warranties arise:

(1) In a sale of goods by description there is a double warranty. (a) that the goods shall correspond to the description, and (b) that the goods shall be of a merchantable quality and condition: *Hawkins v. Pemberton*, 51 N. Y. 198; *Walcott v. Mount*, 36 N. J. Law, 262; *Horse v. Union Stock Yards Co.*, 21 Ore. 289; *Murchie v. Cornell*, 155 Mass. 50; *Chalmers's Digest*, § 16.

As to the first proposition, Rogers, J., in *Borrekins v. Bevan*, 3 Rawle, 23, 43, said: "In all sales there is an implied warranty that the article corresponds in specie with the commodities sold. It may be safely ruled, that a sample or description in a sale-note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described, or represented to be by the vendor."

There is no doubt that in a contract of sale words of description are held to constitute a warranty that the articles sold are of the species and quality so described: *Hogins v. Plympton*, 11 Pick. 97; *Windsor v. Lombard*, 18 Pick. 57; *Bach v. Lacy*, 101 N. Y. 511; *Fleck v. Weatherston*, 20 Wis. 392; *Wether v. Davis*, 44 Me. 147.

As an inspection of the goods is necessary to enable the buyer to ascertain whether they answer the description by which they were sold, it follows that the seller is bound to give the buyer an opportunity to make such inspection, and an acceptance for that purpose will not be a waiver of the right to object: *Doane v. Dunham*, 79 Ill. 131.

Goods not equal to sample or description, may be rejected by the buyer, but if he accepts them he may recover on the warranty: *Cox v. Long*, 69 N. C. 7; *Rogers v. Niles*, 11 Ohio, 48; *Field v. Kinnear*, 4 Kan. 476; *Boothby v. Plaisted*, 51 N. H. 436.

As to the second proposition, their merchantable quality and condition, we find, where goods are sold by description and not by the buyers selection or order, and without any opportunity for inspection, there is ordinarily an implied warranty, not only that they conform to the description in kind and species as before stated, but also that they are merchantable; not that they are of the first quality or the second quality, but that they are not so inferior as to be unsalable among merchants or dealers in the article; *i. e.*, that they are free from any remarkable defects. In such sales the doctrine of *caveat emptor* does not apply. This is especially true where the vendor is the manufacturer, or the sale is executory for future delivery: *Gallagher v. Waring*, 9 Wend. 28; *Brantley v. Thomas*, 22 Tex. 270; *McClung v. Kelly*, 21 Iowa, 508; *Fogel v. Brubaker*, 122 Pa. 15; *Hood v. Block*, 29 W. Va. 445.

An exception to this rule was held to exist in *Chicago, etc., Co. v. Tilton*, 87 Ill. 180, where both parties were dealers in a board of trade, under rules providing that one who took property without inspection, took it at his own risk. This implied warranty of merchantability by a manufacturer, has sometimes been implied even when there was express warranties as

to other qualities, which were silent on this particular subject: *Wheeler v. Owens*, 64 Ga. 601; *Merriam v. Field*, 24 Wis. 640.

But in a recent case, in the Supreme Court of the United States, it was held that an express warranty of quality, excludes any implied warranty of merchantability, especially if accompanied by the delivery and acceptance of a sample as such: *DeWitt v. Berry*, 134 U. S. 306; *Cosgrove v. Bennett*, 32 Minn. 371.

(2) Where the buyer, relying on the seller's skill or judgment, orders goods for a particular purpose, known to the seller, which is in the course of seller's business to supply, there is an implied warranty that the goods shall be fit for such purpose: *Chalmers's Digest*, § 17; *Randall v. Newson*, 2 Q. B. Div. 102; *Hoe v. Sanborn*, 21 N. Y. 552; *Rodgers v. Niles*, 11 Ohio, 48.

In purchases for a particular use made known to the seller, if the buyer relies on the vendor's judgment to select, and not on his own, there is an implied warranty that the article furnished is reasonably fit and suitable for that purpose: *Morse v. Union Stock Yard Co.*, 21 Ore. 289.

This is more obvious when the seller is also the manufacturer, but it is equally true when he is only a merchant; provided always, that the buyer in fact relies upon the seller's judgment, and does not inspect for himself: *Dushane v. Benedict*, 120 U. S. 630.

As example, a sale of barrels to be filled with whiskey, implies that they will not leak: *Poland v. Miller*, 95 Ind. 387; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Howard v. Hory*, 33 Wend. 350; *Rease v. Sabin*, 38 Vt. 432; *Byers v. Chapin*, 28 Ohio, 300.

It must be distinctly borne in mind, however, that this implied warranty of fitness does not arise (in the absence of fraud) when the buyer selects his own articles on his own judgment, although the vendor (not being a manufacturer) knows it is intended for a particular purpose. If the purchaser gets the exact article he buys, and buys the very thing he gets, he takes the risk of fitness for the intended use: *Deming v. Foster*, 48 N. H. 165; *Height v. Bacon*, 126 Mass.

10; *Walker v. Inc.*, 57 Md. 155; *Armstrong v. Bufford*, 51 Ala. 410; *Port Carbon Iron Co. v. Groves*, 68 Pa. 149.

(3) In a sale by a manufacturer there is an implied warranty that the goods are of the seller's own manufacture: *Chalmers's Digest*, § 17; *Johnson v. Raylton*, 7 Q. B. Div. 438.

(4) In addition to all other implied warranties, it is possible that custom and usage, if sufficiently well established, may modify, enlarge, or restrict warranties usually created by law. Thus, in *Schnitzner v. Oriental Print Works*, 144 Mass. 123, it was held that, in a sale of Persian berries in bags by sample, a custom might be shown that the sample represented only the average quality of the entire lot, and not the average quality of the contents of each bag taken separately; if so, the buyer would have no remedy merely because the average of one bag fell below the sample, if in fact the average of the entire quantity, taken as whole, did conform to the standard. But a usage that in sales by sample there is an implied warranty against latent defects is invalid and illegal: *Dickinson v. Gay*, 7 Allen, 29; *Coxe v. Heisley*, 19 Pa. 243.

So a usage that plain words of representation, merely in their ordinary sense, shall be understood as words of warranty is invalid: *Weatherill v. Nilsson*, 20 Pa. 448.

Conversely, a usage derogating from the common law rule of implied warranties is invalid; as a usage that a manufacturer does not impliedly warrant against latent defects in the article he is manufacturing is inoperative against a written contract from which the law would imply such warranty: *Whitmore v. South Boston Iron Co.*, 2 Allen, 52.

Remedies:

A right of action for breach of warranty exists, although the vendor had expressly agreed to take back the property in case it did not correspond with the warranty. The right to return is merely accumulative remedy: *Douglass Ass. Co. v. Gardner*, 10 Cush. 88; *Perrine v. Serrell*, 30 N. J. Law, 454; *McCormack v. Dunville*, 36 Iowa, 645. Unless the buyer expressly agrees that the thing shall be returned if defective, in which case he may not have a right to keep it and sue on the warranty: *Bomberger v. Griener*, 18 Iowa, 477. And,

although the buyer has exercised his right of return, an action for breach of warranty will lie for any actual damages thereby sustained before such return: *Clark v. McGatchie*, 49 Iowa, 437; *Kimball v. Vorman*, 35 Mich. 310.

The mere fact of acceptance and use of the goods, even after knowledge of the defect, does not prevent a resort to an action upon a warranty, or for fraud. The buyer need not return them, nor offer to do so, nor give any notice, in order to sue upon his warranty: *Warcing v. Mason*, 18 Wend. 426; *Vincent v. Leland*, 100 Mass. 432; *Fisk v. Tank*, 12 Wis. 277; *Hughes v. Bray*, 60 Minn. 284; *Kellogg v. Denslow*, 14 Conn. 411.

No doubt a failure to return the goods or notify the vendor of the defect after sufficient opportunity to examine them, may be some evidence that no defect existed, but it is not a condition precedent to the action, nor in law, a waiver of the warranty, though some states seem to hold it so, especially in executory contracts, and when the defects are apparent: *Donnee v. Dow*, 64 N. Y. 411; *Defenbaugh v. Weaver*, 87 Ill. 132. But it seems to be a question of fact for the jury in each case, under proper instructions from the court.

An action for a breach of warranty may be maintained although the goods are not paid for, or though notes for the price are still outstanding: *Aultman v. Wheeler*, 49 Iowa, 647; *Frohreich v. Gammon*, 28 Minn. 476; *Crichton v. Comstock*, 27 Ohio, 548. Or, although the buyer has sold the goods and no claim has been made on him for the alleged defects: *Muller v. Eno*, 14 N. Y. 598.

An action may legally be sustained upon a warranty, although the buyer allows the seller to recover judgment for the full price because he did not set up the defence. The failure to rely upon the defect is only a matter of evidence as to the non-existence of such defence: *Bodurtha v. Phelon*, 13 Gray, 413. and *vice versa*: *Barker v. Cleveland*, 19 Mich. 230. But no action will lie on a warranty unless the title has fully passed to the buyer.

The general rule of damages in actions upon a warranty is too well settled to require citation, viz: the value of an article

corresponding to the warranty, minus the value of the article actually received. And this seems to be so both in express and implied warranties: *Coburn v. Ketter*, 4 Pa. 168; *Comstock v. Hutchinson*, 10 Barb. 211; *Rutan v. Ludlam*, 29 N. J. Law, 398.

And it is immaterial that the purchaser subsequently sold the article for a higher price than he paid: *Brown v. Bigelow*, 10 Allen, 242.

As to special or consequential damages not quite so much unanimity exists: See *Thoms v. Dingsley*, 70 Me. 100. In that case the expense of taking out defective carriage springs and inserting others in their place was allowed.

In a sale of seeds to a market gardener, known to be for his own use, that being considered an implied warranty of fitness for that special use, the buyer may recover as damages the difference between the value of the crop raised from the seed and the value of what a crop would have been raised from such seed as they were warranted to be: *Woolcott v. Mount*, 36 N. J. Law, 262; *White v. Miller*, 71 N. Y. 118; *VanWyck v. Allen*, 69 N. Y. 61.

Gains prevented, as well as losses sustained, may be sometimes recovered if they can be clearly established by the evidence as natural results of the breach of warranty. *Griffin v. Colper*, 16 N. Y. 489; *Messmore v. N. Y. Steel and Lead Co.*, 40 N. Y. 422.

EDGAR H. ROSENSTOCK.

CORNELL, 1894.

DEPARTMENT OF WILLS, EXECUTORS AND ADMINISTRATORS.

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SYNGE P. SYNGE.¹

The defendant agreed by ante-nuptial written promise to leave a certain house and land, by will, to the plaintiff for life, if she would marry him. The marriage took place but sometime afterward he conveyed the property to third parties.

In an action for damages for breach of contract the court held that the conveyance by the husband was a breach of contract for which the wife had an immediate right of action and could recover damages.

CONTRACTS TO MAKE WILLS.

The law is in a somewhat unsettled state with regard to joint and mutual wills and contracts to make wills. The point most difficult to overcome is the irrevocable quality of such instruments, for one of the chief features of a will is its ambulatory character.

The case of *Dufour v. Pereira*, 1 Dick. 419, decided in 1769, is one of the oldest cases on this subject and one of those most frequently cited as establishing the validity of mutual wills. Husband and wife had made a mutual will, and on the death of the husband it was proved as his will, the wife taking the benefits it conferred on her. Before her death she made another will which if carried into effect would revoke the mutual will. The question to be decided was whether her second will should be admitted to probate or declared void.

The court decided that the wife could not revoke the mutual

¹ Reported in 1 Q. B. 466 (1894).

will after the death of the husband, Lord Camden saying: "It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it had given notice to the other of such revocation. But I cannot be of opinion that either of them, could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will. It is a contract between the parties which cannot be rescinded, but by the consent of both."

In 1797, *Walpole v. Orford*, 3 Ves. 402, was decided. George, Earl of Orford, in 1752, made a will in favor of the defendants; but in 1756 he and Lord Walpole each made a will (a reciprocal sacrifice of female issue) in favor of the collateral heirs, male, in order to preserve the family estates in the name of Walpole. Lord W. died in 1757, and Earl G. in 1791; but in 1776 the latter had made a codicil in which he referred to his last will as dated November 25, 1752. A bill was presented, claiming that Earl G. had made a mistake in referring to his last will as dated 1752, and that, under the circumstances, he must have meant 1756; and even though he did not, he could not revoke his will of 1756 by the codicil of 1776, because the wills made by him and Lord W. were mutual wills, in the nature of a compact, and Earl G., having acquiesced for thirty-five years in the benefits conferred on him by the will of Lord W., could not revoke his own to the detriment of the heirs of Lord W.

The two wills were executed at the same time and place, were drawn by the same solicitor, had the same witnesses, and were expressed in similar language, and there was other evidence that they were intended as mutual wills; but Lord Loughborough dismissed the bill on the grounds that the terms of the agreement were not clear, certain, and fair, and that there was not the degree of evidence required by the Statute of Frauds.

Lord Hargrave, in his excellent discussion of the case, *2 Hargrave's Jurisconsult Exercitationes*, 70, disagrees with the decision reached by Lord Loughborough, and thinks the evidence sufficient to establish the instruments as mutual wills.

He believed that, as Earl G. had taken benefits under the will, equity as well as good faith and conscience should restrain him from disappointing its provisions.

In his opinion, there was a binding compact or agreement which neither party should have been allowed to revoke without giving due notice to the other; otherwise, it would give license to both to impose on each other at pleasure and gain undue advantage over the other. His opinion agrees with that of Lord Camden, in *Dufour v. Pereira*, and is sanctioned by the decisions of many courts: *Carmichael v. Carmichael*, 72 Mich. 76; *Bird v. Pope*, 73 Mich. 483; *Breathitt v. Whitaker's Ex'rs*, 8 B. Monroe, 530; *Bolman v. Overall*, 80 Ala. 457.

Lord Hargrave states several very early cases in which actions were brought and sustained for breach of agreement, in consideration of which certain testamentary dispositions had been made and gives others in which specific performance had been decreed. From which cases he infers that compacts and agreements on the faith of which wills are made, or forborne to be made, are enforceable at law or in equity; the party injured by the breach receiving damages or relief in the nature of specific performance.

The first decision in this country on mutual wills is *Isard v. Middleton*, 1 Desaus, 115, in 1785. R. and J. had verbally agreed that if either should die without male issue, he should bequeath a certain sum to the survivor for the purpose of keeping up the family name. R. made his will accordingly, trusting that J. would do the same, but on the death of J. found that J. had bequeathed his entire estate to his sister. The agreement being within the Statute of Frauds a bill for its specific performance was dismissed. The case is not well reported, but from the opinion of the court it is usually cited as sanctioning the validity of mutual wills.

This case was followed, in 1811, by *Rivers v. Ex'rs of Rivers*, 3 Desaus, 188, in which the court held that the husband would be bound by an ante-nuptial agreement to make adequate provision for the wife in consideration that she renounce all claims to his estate. The husband made pro-

vision for her in his will, but the court, considering it inadequate, decreed that it be enlarged, stating that a man may renounce every benefit or right which the law allows him if he does so fairly and without fraud, and he will be bound by his agreement so to do.

Cases in which it has been necessary to consider the force and validity of mutual wills have arisen in many of the States, and courts have almost always decided in their favor.

The case usually relied on by those claiming adversely to such instruments is *Hobson v. Blackburn*, 1 Add. 277, decided in 1822. In the course of his opinion, Sir John Nicholl said of a joint will: "An instrument of this nature is unknown to the testamentary law of this country, or in other words, it is unknown as a will." He thought, however, that it might be sustained in equity by making the devisees trustees for performing the testator's part of the agreement, but would not admit it to probate as a will, because it was irrevocable by the testators. This case is often cited as deciding that joint or mutual wills are void and cannot be admitted to probate, but this interpretation of the case is incorrect, for the will had previously been probated as the will of one of the testators, and was now asked to be admitted to probate in preference to a later will by one of the survivors, which revoked his share of the joint dispositions. This the court refused to do, deciding that joint wills are not irrevocable.

Clayton v. Liverman, 2 Dev. and Bat. 558, was decided on a misinterpretation of this case. After the death of two sisters, an instrument executed by them as their last will was offered for probate, but was refused because it purported to be a mutual will and was thought by the court to imply an agreement: *1 Wm.'s Ex'rs*, 8 (9 Ed.); but see also pp. 107-109.

As the instrument was an expression by each of the disposition she desired to have made of her property after her death, and as no revocation had been attempted by either sister, and probate had not been offered until after the death of both, it is difficult to see why it should not have been admitted either as a mutual will or as the separate will of each:

Redfield's Law and Practice of Surrogate Courts, 129; *Beets v. Harper*, 39 Ohio, 639.

The reasoning of the court in the case of *Ex parte Day*, 1 Bradf. 416, in which the facts were similar to those in Clayton and Liverman, is far more logical. The court says: "The subscription at the end of the will, the declaration of its testamentary character, and the attestation by two witnesses, if proved, are none the less true of each of the testators, because true of both," and "Because the will happens to be made in conformity to some agreement, or contains on its face matters of agreement, or shows mutuality of testamentary intention between two persons, and a compact or intention not to revoke, in my judgment it is none the less a will."

Where an agreement has been entered into to make a will of a certain tenor for a valuable consideration, as for services to be performed, and the promisee has fulfilled his part of the agreement, it is but just that the agreement should be enforced even though it is necessary to hold the first will irrevocable by a later will of the promisor. In many cases the contract has been that the promisor will bequeath his property to the promisee, in consideration that the promisee maintain him and give him a home for the remainder of his life. Though such agreements have been entered into verbally, and legatees under a second will have tried to justify their claims under the Statute of Frauds, if the contract is fair, just and reasonable, and the promisee has executed his part of the agreement, a court of equity will enforce the contract regardless of the Statute. *Bolman v. Overall*, 80 Ala. 451; *Wall v. Scales*, 47 N. C. 472.

In *Gould v. Mansfield*, however, the court decided that an oral agreement between two sisters, that each should make a will devising to the other all of her property, is a contract for the sale of lands, and therefore within the Statute, though it was shown that the surviving sister, who asked for the specific performance of the agreement, had performed services and expended money in the belief that the intestate had made a will in accordance with the agreement. As before stated, it is on the Statute of Frauds that the decisions in *Walpole v. Orford* and *Isard v. Middleton* partly rest.

One may renounce his right to dispose of his property at pleasure, and bind himself by contract to dispose of it by will to certain persons, and such contract will be enforced, not by setting aside the will, but by making the executor, heir or devisee, trustee to perform the contract: *Gilmere v. Battison*, 1 Vern. 48; *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Maddox v. Row*, 23 Ga. 431; *Bolman v. Overall*, 80 Ala. 451; *Van Duzee v. Vreeland*, 12 N. J. Eq. 142; *Carmichael v. Carmichael*, 72 Mich. 76; *Bird v. Pope*, 73 Mich. 483; *Emery v. Darling*, 73 N. E. 715; *Smith v. Pierce*, 65 Vt. 200; *Wright v. Wright*, 23 L. R. A. 196; 3 *Parsons on Contracts*, 406, 407.

In *Tuit v. Smith*, 137 Pa. 35, the plaintiff brought an action of ejectment claiming, under a deed dated 1885, from S., given in consideration that he support her. The defendant put in evidence a testamentary writing, dated 1884, in which S. stated that she bequeathed all of her property to the defendant for his kindness and care of her during her natural life, and also that he was to take possession of the house and take her into his family as a member thereof. The defendant acted in accordance with this agreement, but S. left the house within a year without cause. *Held*, that there was nothing to justify a rescission of the contract, and ejectment was not granted.

Where a party has agreed to adopt a child and make him heir, and the party dies intestate, it often happens that heirs of the intestate will attempt to defeat the claims of the adopted child. In a case recently decided (1894), *Wright v. Wright*, 23 L. R. A. 196, the defendant was taken by W. and wife with the intention of adopting him as their son, the agreement being that he should become their heir and come into possession of their property. The defendant supposed he was the son of W., and faithfully performed his duties to his adopted parents, giving his entire time to them without remuneration. On the death of W., the defendant being then twenty-two years of age, learned of his adoption, and that the statute under which he had been adopted was unconstitutional.

W. having died intestate, his heirs claimed his property, but the court held that as there had been a contract, that the defendant should have the property of which W. might die

seized, and as there had been such performance on the part of the defendant as to take the case out of the Statute of Frauds, "equity should enforce this understanding despite the law," and the title and estate should vest in the defendant the same as if he had been the son: *Van Dync v. Vreeland*, 12 N. J. Eq. 142; *Sharky v. McDermot*, 91 Mo. 647; *Healey v. Simpson*, 113 Mo. 340.

In the cases thus far considered, the remedy for breach of contract to make a will in favor of a certain person or persons, was sought after the death of one of the contracting parties when his will was offered for probate, and its provisions were not consistent with the contract, or when having died intestate, heirs claimed the property in opposition to the contract; but in *Synge v. Synge* (1894), 1 Q. B. 466, an action for breach of damages was brought during the life of both contracting parties.

The defendant before marriage agreed, by letter, as an inducement thereto, to leave to the plaintiff by will a certain house and land for life. The marriage took place, but sometime afterward the defendant conveyed his entire estate to third parties. The plaintiff claimed a life estate in the property, commencing on her husband's death, and that the conveyance was subject thereto, or in the alternative, claimed damages for breach of contract.

Four questions were considered by the court. *First*. "Was there a binding contract?" This was decided in the affirmative, Kay, L. J., expressing his opinion that the proposal of terms was made as an inducement to the lady to marry, and that she married the defendant on the faith that he would keep his word.

Second. "Was there such a contract as could be enforced in equity, or was there a remedy in damages for the breach of it?" The decision on this point was that, marriage being a valuable consideration, and the contract being in writing so that no question on the Statute of Frauds could arise, equity would give effect to the proposal, or the plaintiff could recover damages for its breach: *Hammerley v. De Bick*, 12 Cl. and F. 45, at 78. See, also, *Wall v. Scales*, 47 W. C. 472.

Third. "Has the time arrived at which such remedy can be asserted?" The court said that, as the plaintiff asked for damages for breach of contract, and as by the conveyance the defendant had put it out of his power to perform his part of the contract, the plaintiff could maintain an action for its breach at once, and need not be delayed until the time set for the performance of the contract: *Hochster v. De La Tour*, 22 L. J. (Q. B.) 455; *Frost v. Knight*, Law Rep. 7 Ex. 111; *Short v. Stone*, 8 Q. B. 358; *Ford v. Tiley*, 6 B. and C. 325.

Fourth. "If remedy be by way of damages, what amount of damages should be given?" The answer to this was that "the amount must depend on the value of the possible life estate which plaintiff would be entitled to if she survived her husband."

This decision certainly is reasonable, for it would be unjust to allow the defendant to convey the property to third parties, regardless of his obligations under the contract into which he entered.

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ELLISON'S ESTATE.¹ ORPHANS' COURT OF PHILADELPHIA CO., PENNSYLVANIA.

AN executor's account was filed in November, 1881, and confirmed absolutely in January, 1882. On April 3, 1893, one of the *cestui que trusts* filed a petition for review. All the evidence alleged in support of the petition was accessible to the petitioner in 1881, and was then considered and made the subject of certain action agreed to between the accountants and the trustee for petitioner's sister, who was another of the *cestui que trusts*. These facts although known in 1881 to the petitioner's trustee, who was also one of the accountants, were not actually brought home to her until 1893. It was not alleged that any fraud was practiced against petitioner's sister. *Held*, that the petitioner was barred by laches.

THE TIME LIMIT IMPOSED UPON BILLS OF REVIEW IN PENNSYLVANIA UNDER THE ACT OF 1840, WITH SOME CONSIDERATION OF THE PROCEDURE IN OTHER STATES.

Where a decree has been made by the Orphans' Court confirming the account of an executor, administrator or guardian, no distribution having taken place under such decree, the Orphans' Court has power under the Act of October 13, 1840, to entertain a bill of review to correct such account, even though five years have elapsed between the confirmation of the account and the petition for review. In support see *George's Appeal*, 12 Pa. 260 (1849); *Gillen's Appeal*, 8 W. N. C. 499 (1880); *Lightcap's Estate*, 29 Pitts. Leg. Jour. 373

¹ Reported in 13 Pa. C. C. Rep. 410.

(1882); *contra*, *Riddle's Estate*, 19 Pa. 433 (1852); *Kinter's Appeal*, 62 Pa. 322 (1869); *Jones's Appeal*, 99 Pa. 129 (1881).

Prior to the Act of 1840, the power of the Orphans' Court to entertain bills of review was subject to no limitations other than such as arose in the discretion of the court, from the circumstances of the particular case in which the bill of review was sought. The remedy is part of a general equitable jurisdiction exercised by the Orphans' Court, and derived from the practice of the Court of Chancery. The nature of the discretion exercised by the Orphans' Court in proceedings upon bills of review is clearly shown in *Briggs's Appeal*, 5 Watts. 94 (1836), where Justice Sergeant said :

"The Orphans' Court, in analogy to the practice of chancery, has power, by a proceeding or petition in the nature of a bill of review, to correct an account, after confirmation, for errors apparent on its face, or new matter discovered since. Great injustice might take place if this power were denied them. At the same time it is requisite that this discretion be exercised with great caution, and only within a reasonable time, otherwise accounts never would be at rest."

In this case it was held that the Orphans' Court, in the exercise of its discretion, had power to order a review of a guardian's account, although five years had elapsed since confirmation on the ground of his omission to account for money received—the omission having been newly discovered.

Following the decision in *Briggs's Appeal*, the Pennsylvania Act of October 13, 1840, was passed (§ 1, P. L. 1; Br. Purd., 1286, § 61), providing that :

"*The judges of the Orphans' Court of the Commonwealth of Pennsylvania, within five years after the final decree, confirming the original or supplementary account of any executor, administrator or guardian, which has or may be hereafter passed as aforesaid, upon petition of review being presented by such executor, administrator or guardian, or their legal representatives, or by any person interested therein, alleging errors in such account, which errors shall be specifically set forth in said petition of review, and said petition and errors being verified by oath or affirmation; said Orphans' Court shall grant a rehearing of so*

much of said account as is alleged to be error in said petition of review and give such relief as justice and equity may require, by reference to auditors, or otherwise; with like right of appeal to the Supreme Court as in other cases, except that the appeal shall be taken under the provisions of this Act, within one year after the decree made on the petition of review:

"PROVIDED, *That this Act shall not extend to any cause where the balance found due shall have been actually paid and discharged by any executor, administrator or guardian.*"

"The judges of the Orphans' Court . . . within five years . . . shall grant a rehearing:" *Act of Oct. 13, 1840.*

This language is capable of two constructions: (1) Either that the parties in interest must bring their bill of review *within five years or not at all*; (2) Or, that it is *obligatory* upon the court to grant a rehearing *within five years*, and, *in its discretion*, to grant or refuse such rehearing *after five years*. In either event, under this latter construction, the parties in interest *have the right to present their petition for review.*

On the one hand, the Supreme Court, in the cases of *Riddle's Estate* and *Jones's Appeal*, refers to the Act of 1840 as fixing a limitation to petitions of review, and Justice Sharswood, in *Kiuter's Appeal*, said: "The object of that Act (1840) seems to have been to make a bill of review in the Orphans' Court a matter of right, and, at the same time, prescribe a limitation of time to the exercise of the power."

On the other hand the court, in *George's Appeal*, declared the limitation of five years applicable only "to reviews of alleged errors in the settled accounts of executors, etc."

In *Gillen's Appeal*, the court said: "The Act of October 13, 1840, is an enlarging, not a restraining statute." And, further: "The only effect of that Act (1840) was to make it peremptory on the court to grant the review in the cases within the purview, with the proviso that it should not apply to any case where the balance shall have been actually paid by the executor or administrator."

And in *Lightcap's Estate* Justice Green held that the Orphans' Court had discretionary power to correct its own errors by petition of review outside of the provisions of the Act of 1840.

Witting v. Nissley, 6 Pa. 143 (1847), was decided under the proviso of the Act.

The court said: "In the present case the account was confirmed on the 12th of February, 1839, and by the decree of the Orphans' Court made, the account must be regarded as the final account, on the authority of *Bowers's Appeal*, 2 Barr. 432, and not having been appealed from within three years, nor a review asked for within five years, it is final and conclusive; and should there be errors in the account, as is alleged, they cannot be corrected either in the present form of proceeding, or by a petition for a review.

"Whatever may have been the practice in relation to opening and correcting such accounts, and the time during which it would be allowed, we regard the question now settled by the Act of October 13, 1840.

"By the Act of March 29, 1832 (Purd. 885), the Orphans' Court is declared to be a court of record, with all the qualities and incidents of courts of record at common law . . . and by the Act of October 13, 1840, relating to Orphans' Courts, a review may be granted in a proper case made out within five years after the final settlement of account. . . . These acts, whilst they give to the vigilant every means of redress necessary for their protection, fix a period when all litigation is at an end."

In this case there had been a final accounting and payment by the administrator and releases in full delivered to him by appellant.

In *White's Estate*, 49 Leg. Int. 286 (1892), the court said: "The Act of Assembly is explicit that a review shall not be granted after a fund is distributed."

In *George's Appeal*, 12 Pa. 260 (1849), the court said: "The Orphans' Court has from the beginning exercised the power of reviewing and modifying its proceedings and decrees, as an authority necessarily inherent and essential to the right discharge of its duties. On this point no statutory direction was given till the *Act of October, 1840, which, however, is confined to reviews of alleged errors in the SETTLED ACCOUNTS of executors, administrators and guardians. This limits the period*

within which a review may be had in such cases to five years, but it leaves untouched the pre-existing practice in all other instances. Being thus unrestrained by the written law, I see no objection to the liberal exercise of the right to rehear and redress for the correction of manifest mistake involving injury, tempered, however, by the application of a sound discretion, seeking to protect the rights of third persons, and which, in most cases, would dictate a refusal to interfere when the relative position of the original parties was materially changed, or the interests of third persons might be put to hazard. In estimating such a contingency, the time which had elapsed since the decree complained, would, of course, enter largely into the consideration of the court; and where this was much extended, might of itself afford a sufficient objection to bar the prayer for relief. It is said that, in England, in the time of Lord Guildford, there was no limitation for a bill of review: *Fetton v. Moxlesfield*, 1 Veru. 287; though in *Goddard v. Goddard*, Ch. Rep. 139, it was not permitted sixteen years after a decree, and it now seems to be the rule not to reverse on review after twenty years, except for very apparent error." . . . "Should it become necessary with us to fix the time within which a review may be granted, the period will probably be much abridged by reference to our Acts of 1791, prohibiting writs of error after seven years, or, it may be, to the Act of 1840, just mentioned."

In *Riddle's Estate*, 19 Pa. 433 (1852), Lewis, J., said:

"The Act of October 13, 1840, which fixes a limitation to petitions of review, directs the court to 'give such relief as justice and equity may require.' This may be understood as adopting the principles of equity which had heretofore governed Courts of Chancery in applications of this kind. It was certainly not the intention of the Legislature to keep litigation on foot for a longer period than necessary for the purposes of justice; or to nullify the solemn decisions of the courts at the mere will and pleasure of any party who chose to demand a rehearing, within five years, upon the same questions of fact which had been fully heard and decided on the first trial. To allow this to a party who cannot allege any error in law

it in the East, was entirely foreign to the whole trend of Anglo-Saxon civilization, and the referring of disputes to arbitrators, in whom both sides had respect, could not have been a permanent method for administering justice. It is to the credit, we believe, of our Anglo-Saxon ancestors, that, in spite of the knowledge of their most learned men of more advanced judicial systems, which knowledge we can almost presume from the learning of their clergy, they refused to attempt to perform the impossible. A judicial absolutism was out of the question. The tribunal whose decisions would be obeyed in the majority of instances, thereby ending personal strife between the litigants, was incompetent from its very composition to weigh evidence, and it did not attempt to do so. Time and temper would have alike rendered it futile to introduce evidence on either side. What is the use of going into the existence or non-existence of a fact in issue if the evidence cannot be properly weighed? Again, just as the tribunal would have been unable to decide between conflicting evidence, so likewise it was incompetent to say, in any particular case, whether the amount of evidence produced on one side was sufficient to show that he who had the proof had proved his case. Here again, we find that they did not attempt to do the impossible. They prescribed general rules as to the quantum of testimony sufficient to substantiate an assertion. Once this quantum had been obtained, he who had the proof won the case. It was, therefore, a system in which the result did not in any way depend upon the judgment of the court, or on the judgment of any part of the court. No one was called upon to weigh evidence. We believe that if we were translated back to that time, an investigation would show that in the long run that system of judicial administration was best which accomplished this very result, viz.: the absence of all necessity for the courts to determine disputed questions.

But further our Anglo-Saxon, replying to his modern critics, might say that the methods of proof which he devised were peculiarly well calculated, so far as arbitrary rules can ever be calculated, to ascertain the party in whom the right lay.

iniquity. Its evident purpose was that the decree should never be disturbed so as to do injustice to the accountant. If under it he had paid over money he ought to be protected in that payment, even though it should subsequently appear to have been wrongful. *Whenever, therefore, the object of the review is to surcharge the accountant with money received by him, not accounted for, and, therefore, not at all included in the decree, and not to disturb an appropriation already decreed and consummated by payment, the proviso of the Act of 1840, is not in the way of the proceeding."*

This case decides that the proviso of the Act of 1840 applies to accounts confirmed by decree and consummated by payment, and not to an attempt to surcharge an accountant with money received by him and not accounted for, and therefore not included in the decree of the court. Justice Sharswood's comments upon the object of the Act of 1840, beyond the decision as to the meaning of the proviso as above, were not in any manner necessary to the decision of the case, and must, therefore, be regarded as mere dicta.

In *Bucknor's Estate*, 7 W. N. C. 471 (1879), the court said: "It must be conceded that the petition could not be supported under the Act of October 13, 1840. But the power of the Orphans' Court to correct or amend its decrees when injustice will result by suffering them to stand, does not depend entirely upon this Act; and where no rights have changed in consequence of the decree, this power of correction or amendment will be liberally exercised, notwithstanding the fact that error does not appear on the face of the record, or that new matter is not averred or shown."

In *Gillen's Appeal*, 8 W. N. C. 499 (1880), the court said: "Power to grant a bill of review has always been a well-established branch of the authority of a Court of Chancery, and has been exercised by the Orphans' Court: *Briggs's Appeal*, 5 Watts. 91.

The Act of October 13, 1840, is an enlarging, not a restraining statute.

Excepting under certain circumstances, the court *shall* grant a bill of review: *George's Appeal*, 2 Jones, 262; *Bishop's*

Estate, 10 B. 471; *Prunypacker's Appeal*, 1 Leg. Gaz. R. 484.

On appeal, the Supreme Court, in the course of their opinion, said: "Undoubtedly, prior to the Act of October 13, 1840, the Orphans' Court might entertain a petition of review in cases in which Chancery Courts were in the practice of so doing. *The only effect of that Act was to make it peremptory on the court to grant the review in the cases within the purview, with the proviso that it should not apply to any case where the balance shall have been actually paid by the executor or administrator.*"

In *Littleton's Appeal*, 93 Pa. 181, the court said: "In New York it is held that a bill of review cannot be brought after the time allowed for an appeal: *Boyd v. Vanderkemp*, 1 Barb. Ch. R. 273. Perhaps in this State it would be wise to follow the rules established by the Legislature as to reviews of final decrees confirming the original or supplementary account of any executor, administrator or guardian, by the Act of October 13, 1840, § 1, Pamph. L. 1841, pl. 1, which is five years. This, however, would be only by analogy, for it is clear that the Act of 1840 is not directly applicable. Yet in *George's Appeal*, 2 Jones, 262, Mr. Justice Bell says, 'should it become necessary with us to fix the time within which a review may be granted, the period will probably be much abridged by reference to our Act of 1791, prohibiting writs of error after seven years' (now reduced to two years by Act of April 1, 1874, Pamph. L. 50), or it may be the Act of 1840 just mentioned."

In *Jones's Appeal*, 99 Pa. 129 (1881), the court said: "*The Act of October 13, 1840, not only gives the right of review to a party in interest upon proper showing, but fixes a limitation to petitions of review. . . . Whether the review is demanded for error in law apparent in the decree, or for new matter which has arisen after the decree, or for new proof that has come to light since the decree, the statutory limit applies.*"

In *Milne's Appeal*, 11 W. N. C. 332 (1882), the court said: "We have no doubt about the power of the Orphans' Court 'to revise and correct its former adjudications, if in those adjudications it discovered a palpable mistake, produced either

by its own inadvertence or by the blunder of the parties. A sense of fair dealing and justice would be authority enough, in the absence of any other, for so holding. Nevertheless, other authority will be found, and that directly in point, in *Genge's Appeal*, 2 Jones, 260, where the subject is so fully discussed that further argument from us is unnecessary."

In *In re Estate of G. C. Lightcap, Sr., deceased*, 29 Pitts. Leg. Jour. (O. S.) 373 (1882), 99 Pa. 74, the Supreme Court, in an opinion by Green, J., said: "*It cannot be doubted that the court below had ample power to correct the error of its original decree, either under or independently of the Act of October 13, 1840.* Nothing had been done under the decree, and if it was erroneous it ought to be corrected in the interest of justice and by the court that made it. We held in *Parker's Appeal*, 11 P. F. Smith, 478, that the Orphans' Court under the Act of October 13, 1840, might entertain a bill of review, notwithstanding a decree of affirmance by the Supreme Court. *The discretionary power of the Orphans' Court to correct its own errors by petition of review, outside of the provisions of the Act of 1840, has been affirmed in the cases of Gillen's Appeal, 8 W. N. C. 499, and Whelan's Appeal, 20 P. F. Smith, 410, and is manifest upon plain principles applicable to the power of all courts over their own decrees.*"

Rhone's Orphans' Court, Pr. Vol. 1, p. 645, says: "The object and purpose of the Act of October 13, 1840, was to establish as a matter of right what had been before construed by the courts as matters of grace, and to limit the time for the inquiry and examination of accounts to five years after their final confirmation:" *Ellison's Estate*, 13 C. C. R. 410 (1893).

In this case an executor's account was filed in 1881 and confirmed absolutely in 1882. In 1893 one of the *cestui que trusts* filed a petition for review. *Held*, that under the evidence the petitioner was barred by laches.

In the course of his opinion, Judge Ashman said: "The rule is that laches will bar a suitor of his remedy as effectually as the statute of limitations, and for the same reason, his own inaction raising the identical presumption which the law raises out of mere lapse of time. In recognition of this rule the Act

of October 13, 1840, limited the period within which, as a matter of right, a bill of review can be had to five years from the date of the final decree. Among cases not within the Act, where relief has been sought as a matter of grace, and has been refused upon the ground of laches, we may refer to *Bagg's Appeal*, 43 Pa. 512; *Milligan's Appeal*, 82 Pa. 389; and *Scott's Appeal*, 112 Pa. 427."

The foregoing examination of the Pennsylvania authorities on this subject shows how decided a preponderance exists in the decisions of our Supreme Court in favor of a liberal interpretation of the Act. This power of review, which any other construction of the Act of 1840 than the one here contended for would materially and arbitrarily curtail, is one of the most delicate and important among those entrusted to the Orphans' Court in its equitable jurisdiction over decedents' estates.

Prior to the Act of 1840, the question as to the period of time which by its lapse would constitute a bar to review, was entrusted to the discretion of the court, to be determined by all the circumstances of the case, and the discretion thus vested in the Orphans' Court had always been guardedly and equitably exercised.

The intent of the Legislature in the passage of this Act could never have been to limit to the short term of five years the exercise of a power which, prior thereto, the court had equitably administered after a lapse of twenty years. Apart from the authorities, a consideration of the causes for which bills of review are filed, and of the injustice which so narrow a limitation of the power would produce, will convince that such was not the purpose of the Act.

The end sought by the Legislature was plainly to secure the privilege of review as a matter of right demandable by the parties in interest within the period of five years, and demandable thereafter subject, as formerly, to the equitable discretion of the court.

And this conclusion to which these considerations so clearly point is borne out and confirmed by the opinions of the Supreme Court in *George's Appeal*, *Gillen's Appeal* and *Lightcap's Estate*.

In *Jackson v. Jackson*, 144 Ill. 274 (1893), one of the points

involved in the case was the question under discussion, the bill of review being brought to vacate a decree in a partition proceeding. Justice Craig, in delivering the opinion of the Supreme Court of Illinois, said: "The next question presented is, whether the complainants or either of them have lost their right to bring this bill by lapse of time. As has been seen, the decree was rendered on April 6, 1883, and this bill was brought on August 20, 1890. No time has been prescribed by statute within which a bill of review must be brought, but writs of error are required to be sued out within five years from the time a judgment or decree has been rendered; and in analogy to the time prescribed for prosecuting writs of error, it has been held that a bill of this character should be brought within the time allowed for suing out a writ of error: *Lyon v. Robbins*, 46 Ill. 278." And the same view was taken in the case under consideration.

In the case of *Thomas v. Harvie's Heirs*, 10 Wheaton, 143 (1825), this question was considered by Mr. Justice Washington in rendering the decision of the Supreme Court of the United States. This was an appeal from the Circuit Court of Kentucky. The appellant filed in 1818 a bill to review and reverse a final decree of the same court pronounced in 1810. The Supreme Court said: "The record shows that the order of court permitting the bill to be filed was granted eight years subsequent to the final decree in the original cause; and the question to be decided is, whether the remedy was not barred by length of time?"

"It must be admitted, that bills of review are not strictly within any act of limitations prescribed by Congress; but it is unquestionable that Courts of Equity, acting upon the principle that laches and neglect ought to be discountenanced, and that in cases of stale demands its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts. It is stated by Lord Camden, in the case of *Smith v. Clay* (Ambl. 645, 3 Bro. Ch. Cas. 639, note) "that as the Court of Equity has no legislative authority, it could not properly define the time of bar by a positive rule, but that, as often as parliament had limited the time of actions and reme-

dies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity." Upon this principle it is, that an account for rents and profits, in a common case, is not carried beyond six years, or a redemption of mortgaged premises allowed after twenty years possession by the mortgagee, or a bill of review entertained after twenty years, by analogy to the statute which limits writs of error to that period.

These principles seem to apply, with peculiar strength to bills of review, in the courts of the United States, from the circumstance that Congress has thought proper to limit the time within which appeals may be taken in equity causes, thus creating an analogy between the two remedies by appeal, and a bill of review, so apparent that the court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former." And in *Central Trust Co. v. Grant Locomotive Works, et al.*, 135 U. S. 207 (1890), the principles laid down in *Thomas v. Harvie's Heirs* were adverted to and re-affirmed.

In an action of accounting a court of equity will not lend its aid to the enforcement of stale claims. In the case of *Bell et al. v. Hudson et al.*, 73 Cal. Rep. 285 (1887), it was held that a Court of Equity, on account of the staleness of the claim, would not entertain an action for an accounting of the affairs of a partnership, which was brought by the personal representative of one partner, twenty-five years after his death, against the personal representative of the other, when the complainant failed to account for the delay by showing that the heirs of the former partner had no knowledge of their rights, or that there was some impediment to a prior action by them.

In perhaps the majority of the States there is no statute of limitations governing such cases—certainly no such statute as the Pennsylvania Act of 1840—and the entertainment and decision of such cases is left entirely to the discretion of the Court of Equity before which they are brought. The general attitude is well set forth by Chief Justice Taney, in delivering the opinion of the Supreme Court of the United States in *McKnight v. Taylor*, 1 How. 168:

"In matters of account, where they are not barred by the Act of Limitations, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time and the evidence may be lost."

As stated by Davis, J., in *McQuiddy v. Warr*, 20 Wall. 19, "there is no artificial rule on such a subject, but each case as it arises must be determined by its own particular circumstances." In other words, the question is addressed to the sound discretion of the chancellor in each case. How clearly this doctrine appears in some cases is illustrated in the above-cited case of *McKnight v. Taylor*, where the bill was filed to adjust matters of account *which were not barred by the Statute of Limitations*, but were, nevertheless, dismissed for want of reasonable diligence.

The principle to be deduced from the cases not governed by statute seems to be that a bill of review for error apparent on the record must be brought within the time in which, at the common law, a writ of error could be brought, and that the allowance of a bill of review for after-discovered matter is wholly within the equitable discretion of the court as to the question of time, as well as in other respects.

It appears that, as a general rule, it is not allowed after the time allowed for a writ of error has elapsed since the evidence was discovered. The whole subject is one which the Legislatures of our States will do well to leave to the sound discretion of our Courts of Equity as any attempt at statutory limitation of a power so delicate, so important and so necessarily discretionary, cannot but be frequently attended with mischievous results.

H. BOYD SCHERMERHORN.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS FOR SEPTEMBER.

Among the decisions reported during the past month are several that present novel and interesting points of law, as well as some cases of first impression, at least in the particular court. The Court of Common Pleas of New York City has held that a restaurant keeper is liable, in the absence of due care, for the loss of a customer's wraps left in his charge, on the ground that the bailment is not gratuitous, but for profit: *Bullman v. Dennett*, 30 N. Y. Suppl. 247. This is in accord with the previous decision of the same court in *Bird v. Everard*, 23 N. Y. Suppl. 1008, and of the Court of Errors and Appeals in *Bunnell v. Stern*, 122 N. Y. 539; S. C., 25 N. E. Rep. 910. This reasoning would make any tradesman or business man liable for property put in his possession by customers, as has in fact been held in the case of a tailor: *Rea v. Simmons*, 141 Mass. 561; S. C., 55 Am. Rep. 492; *McCullin v. Reed*, 16 W. N. C. 287.

The Supreme Court of Missouri has ruled that the intent manifested by an advertisement for bids must govern its interpretation; that when the advertisement is nothing more than a suggestion to induce offers for a contract by others, it imposes no liability *per se*; and that an advertisement reserving the right to reject any or all bids gives the lowest bidder no right to the contract, even if the body advertising for bids acted arbitrarily, capriciously and through favoritism, in awarding the contract: *Anderson v. Board of Public Schools*, 27 S. W. Rep. 610.

It is held by the Supreme Court of New York, in accordance with the general doctrine on the subject, that a deed from a cemetery association to a lot in the cemetery, though absolute in form, conveys no title to the soil, but only a right of burial; and that, therefore, a statute

directing a removal of the bodies interred in a cemetery, without providing for compensation to the lot-owners, is constitutional: *Went v. Meth. Prot. Ch. of Williamsburgh*, 30 N. Y. Suppl. 157.

In *Mcuer v. Chic., M. & St. P. Ry. Co.*, 59 N. W. Rep. 945, the Supreme Court of South Dakota has held that a special contract, made in one state, between a railroad company and a shipper, for transporting property of the latter from a point in that state to a point in another state, is to be interpreted according to the laws of the former state; but that the courts of the other state will not take judicial notice of the laws of the former, and they must be proved as any other fact. If not so proved they will be presumed the same as those of the state where the suit is brought.

The same principle is asserted by the Supreme Court of Vermont in *Barrett v. Kelley*, 29 Atl. Rep. 809, which decides that when a chattel is sold under a contract executed in another state, reserving the legal title to the vendor until the price is paid, the laws of the state where the contract is made will govern the rights of the parties. Similarly, the Supreme Court of Rhode Island has ruled, on the authority of *Milliken v. Pratt*, 125 Mass. 374, that when a married woman, a resident of one state, enters into a contract, in another state, intended to take effect in that state, which, though valid where made, is invalid in her own state, and the latter afterwards empowers her to make such a contract, the contract may be there sued on: *Case v. Dodge*, 29 Atl. Rep. 785. See *Ruhe v. Buck* (Mo.), 27 S. W. Rep. 412, mentioned in 1 Am. L. Reg. & Rev. (N. S.) 664.

The Supreme Court of New York has also adopted a very wide and salutary restriction upon the rule of criminal evidence which requires a conspiracy to be proved before the acts and declarations of one conspirator can be given in evidence against his fellow conspirators, by holding in *Pro. v. McKane*, 30 N. Y. Suppl. 95, that such declarations may, when justice requires it, be admitted before proof

of the conspiracy. The Supreme Court of Arizona holds a contrary doctrine, under the provisions of the statutes of that territory: *Territory v. Turner*, 37 Pac. Rep. 368. This exception, however, is not exactly an innovation, having been asserted for years, though rarely. It may be applied when the state promises to introduce *prima facie* evidence of the conspiracy during the progress of the trial: *State v. Grant*, (Iowa), 53 N. W. Rep. 120; and in general, its application rests in the discretion of the court, and is only permissible under particular and urgent circumstances: *Hall v. State*, (Fla.), 12 So. Rep. 449; *State v. Flanders*, (Mo.), 23 S. W. Rep. 1086.

The Court of Appeals of Maryland has recently passed upon one of the questions of constitutional law that continually recur in regard to the taking of property under the right of eminent domain. In *Garrett v. Lake Roland El. Ry. Co.*, 29 Atl. Rep. 830, that court decided that the building of abutments, to be used as the approach for elevated railway tracks, in the centre of the street, was not a taking of the property of abutting landowners, within the meaning of the clause of the constitution, forbidding the "taking" of property for a public use without compensation being first paid therefor or tendered, so as to entitle the landowners to enjoin the erection of the same, until compensation was paid for the injury; and this in spite of the fact that the bill showed that the street was narrowed by the abutments to a mere alley, and alleged that the erection deprived the adjacent premises of light and air. Bryan, J., dissented, in an able and forcible opinion.

The decision of the court *may* have been correct, on the state of facts presented; but it does not carry any very convincing weight of authority. It is unfortunately true that the tendency of recent years has been to narrow the constitutional provisions as to compensation for the taking of property to as slender a compass as possible, in direct violation of every principle of construction, as witness, *inter alia*, the trolley road cases. But to deny that the building of an elevated railroad

is an additional servitude on the street would be sheer nonsense; and accordingly the court rested its ruling on the ground that the deed of the landowners did not cover the soil of the street, and therefore the abutments imposed no burden on them. This is perhaps a tenable view, in the present unsettled state of opinion in regard to the ownership of the fee of the streets of a municipal corporation; but ought to vanish with a clear understanding of that point. The true solution of the problem seems to be this. Strictly, in spite of all dicta to the contrary, a municipal corporation does not own the fee of the streets. It owns only the easement of the public therein, and holds it in trust for the public; and can therefore apply it to none but public uses, a restriction which would not exist, if it owned the fee. The easement, however, is co-extensive with the use of the land, and the fee is therefore a mere reversionary interest, contingent on the surrender of the rights of the public on the vacating of the street. But to hold this would be an absurdity, for this reversion may never occur, or if it occur, there might be no heir of the original owner to receive it. A better doctrine would be, to hold that the deeds of the original owner to his vendees of lots bordering on such streets, though nominally bounded by the street, extended to the centre thereof, just as a deed of land bounded by a stream extends *ad filum aque*, unless the contrary intention is clear. On such a view, the erection in the present case would be a burden on the plaintiff lot-owners, and they could recover. But the chief objection to such a doctrine is, that it would remove a very efficient means of protecting the corporations which exercise the right of eminent domain, and it is therefore not likely to be adopted.

The Supreme Court of California holds, that when a statute does not authorize a change of venue for bias, prejudice or partiality of a judge, it is a contempt of court to present an affidavit for a change of venue, alleging those grounds: *In re Jones*, 37 Pac. Rep. 385.

In *Allen v. Leavens*, 37 Pac. Rep. 488, the Supreme Court

of Oregon has ruled that when goods are sold on the written promise of the defendant to accept an order drawn by the purchaser for the amount of the purchase, the indorsement of the purchaser's name upon such promise is not an order on which the defendant will be liable.

Contract

A curious question has just been decided in the House of Lords in England, on appeal from Scotland. An employé of a stevedore, injured by a defect in the tackle of a vessel which he was engaged in unloading, brought suit against the vessel for supplying weak tackle, and against the stevedore for reckless negligence in the use of the same. A decree was rendered creating a joint and several liability; but the plaintiff, as was his right, recovered the amount of the judgment against one of the wrongdoers, who thereupon brought action against the other to recover his share. The Lords were of opinion, that in spite of the rule which forbids contribution between joint wrongdoers, and which, were the case an English one, would be applied, on the authority of *Merryweather v. Nixan*, 8 T. R. 186, the action could be maintained: *Palmer v. Wick and Pullenctown Steam Shipping Co., Ltd.*, [1894], App. Cas. 318. This decision is not really in contradiction of the general rule, above stated, but presents one of the two clearly defined exceptions to it, arising from the circumstances of the parties. Contribution between tort-feasors is allowed, in the first place, when the parties act in a *bona fide* belief that their act is lawful, and the wrong arises by construction or inference of law: *Vandiver v. Pollak*, (Ala.), 12 So. Rep. 473; or when the party seeking contribution was honestly ignorant of the fact that the act was wrongful: *Johnson v. Torpy*, 35 Neb. 604; S. C., 53 N.W. Rep. 575. In the second place, it is allowed when, as in the case discussed, the torts of the two parties are not the same in their nature, though arising from the same conditions, and they cannot therefore be considered as strictly joint tort-feasors. In such a case, the mere fact that the judgment imposes a joint liability, cannot of course alter the true relation of the parties as between themselves. This rule was applied, on a

Contribution

state of facts much like this, in *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, where it was held that the owner of premises was liable for their unsafe condition, though resulting from the negligence of a third person; but that he could recover a full indemnity from that third person, as they were not *in pari delicto*. The difference in the extent of the remedy between the two cases is due to the fact that in the latter case the negligence was passive, in the former active.

The same body has decided in *Leslie v. Young*, [1894] App. Cas. 335, that the mere publication, in any particular order, of the time tables issued by railway companies, cannot be claimed as a subject matter of copyright by a publisher of a tourist's handbook, if no more has been done than to copy them in their order, leaving out such stations as the author sees fit.

According to the Circuit Court of Appeals, Fifth Circuit, a corporation may vote, at the elections of a competing corporation, on stock held by the former in the latter, in spite of a law of the state to the contrary, where the competition affects interstate commerce only: *Clarke v. Richmond & W. P. Terminal Ry. Co.*, 62 Fed. Rep. 328.

It has been decided by the Court of Appeals, in England, that when a debenture, issued by a company by way of floating security, contains a covenant for the payment of the principal money, on a specified day, though without any stipulation making the money immediately payable in the event of a winding-up, the occurrence of a winding-up before the specified day will render the money immediately payable, and will entitle the holder of the debenture at once to realize his security for the full amount of principal, interest, and costs: *Wallace v. Universal Automatic Machine Co.*, [1894] 2 Ch. 547. The same point was previously decided in *Hodson v. Tea Co.*, 14 Ch. D. 859. See also, *In re Panama, New Zealand and Australian Royal Mail Co.*, 5 L. R. Ch. 318.

The Supreme Court of New Hampshire has very justly ruled, in *Cresser v. Wallace*, 29 Atl. Rep. 842, that a devise to a married woman, to have and to hold to her sole and separate use, free from any interference or control of her husband, and to her heirs and assigns, gives her a fee, not a life estate, with remainder to her heirs; and they will take by descent, not by purchase, on the ground that the clause "to her sole and separate use, etc.," does not in any way qualify or limit the estate granted.

Devise

The adoption of the Australian ballot system, in spite of its many advantages, has given rise to a vast deal of litigation over points that had theretofore been pretty well settled; and has also unfortunately called forth many conflicting decisions. One of the most vexed questions has been that which would seem to be the most simple,—the marking of the ballot, and the consequent validity or invalidity of the vote. In the most recent case on the subject, *Curran v. Clayton*, 29 Atl. Rep. 930, the Supreme Judicial Court of Maine held that, under a statute requiring a cross mark in the square at the right of the name of the party, or individual candidate, ballots marked as follows should be rejected: 1. Where the cross mark was placed above the name of the candidate, and not in the appropriate place at the right of it. 2. Where there was a cross mark above, and one below the name of the candidate, but none at the right. 3. Where the cross mark was placed at the left of the candidate's name. 4. Where there was a cross mark under the party name at the head of the ticket, and one at the left of the name of a candidate of another party. 5. Where there was no cross mark, but a short straight line, drawn across the square at the right of the party name at the head of the ticket. 6. Where there was a cross mark in the square at the right of the name of each candidate of one party, with one exception, and a cross mark in the square at the right of the party name on another column.

Elections

In all these cases, except the last, there could be no reasonable doubt as to the intention of the voter; but the court, dis-

regarding the plain intention of the statute, which is to give the voter a right to vote freely, without fear of intimidation, or deprivation of his right of free suffrage, deliberately assumed that the sole object of the act was to secure secrecy in voting, and that as the peculiar marks might possibly be used, by pre-arrangement with the election officers, as a means of identifying the ballot, they were therefore contrary to the spirit of the act, and rendered the ballot void. There never was a clearer instance of the confusion of the means with the end. The intent of the act was to secure a free vote; the secrecy provided for was the most effectual means of securing that freedom. It is little short of absurdity to claim that an independent voter would deliberately furnish means to identify his ballot. But even if he did so, it would be a most roundabout way of accomplishing what he could do by simple word of mouth, without let or hindrance—tell for whom he voted. If secrecy was the only thing desired, why did not the legislature forbid him to disclose his vote orally?

But the same misapprehension exists elsewhere, notably in Indiana: *Parvin v. Wimborg*, 130 Ind. 561; S. C., 30 N. E. Rep. 790. The Rhode Island courts are a little more liberal, and, while insisting upon a mark to the right of the name, are indifferent to its position, whether within or without the square: *In re Vote Marks*, 17 R. I. 812. The same is the consensus of opinion in the lower courts of Pennsylvania: *Louck's Case*, 3 D. R. 127; *Weidknecht v. Hawk*, 13 Pa. C. C. 41; *York Election*, 13 Pa. C. C. 205.

On other questions they are not agreed: some hold the cross immaterial: *Weidknecht v. Hawk*, *supra*; and that it is sufficient to mark the ballot with a perpendicular stroke: *Hempfield Election*, 14 Pa. C. C. 577; S. C., 3 D. R. 499; others insist upon the cross mark as the palladium of their liberties, or the well-known straw which the drowning man trusts to for salvation, and reject ballots marked with two horizontal lines in the circle intended for the mark: *East Coventry Election*, 3 D. R. 377. Some admit the validity of a cross mark without the square or circle, if close to the name of the candidate or party: *Louck's Case*, 3 D. R. 127; others

reject it unless within the circle: *East Coventry Election*, 377. But the most hopeless conflict is over ballots marked as in the sixth instance in the case under discussion, both after the name of the party and the name of a candidate of another party. Common sense would indicate that the voter intended to vote for that candidate, at any rate, and such has been the decision in some cases: *Wridknecht v. Hawk*, 13 Pa. C. C. 41; *Twentieth Ward Election (No. 2)*, 3 D. R. 120. Legal acumen, however, which is not necessarily synonymous with law, in its boasted capacity of the perfection of human reason, would have it different, and would reject the vote for that office altogether: *In re Election Instructions*, 2 D. R. 1.

In marked contrast with this futile splitting of hairs and consequent nullification of the legislative intent, is the admirable decision in *Woodward v. Sarsons*, 10 L. R. C. P. 733, which holds that the main object of the ballot acts is to secure the carrying out of the intent of the voter, and that anything that goes to show that intent clearly is a valid marking; and that therefore ballots marked with two crosses, or three, instead of one, with a single stroke, a straight line, a mark like an imperfect P added to the cross, a star, a blurred or ill-marked cross, a pencil line through the names of candidates not voted for, a cross to the left of the name, and even a ballot paper torn in two longitudinally down the middle, are good. A comparison of the lucid opinion in which this doctrine was asserted with the abortive efforts at special pleading in the cases cited above makes one blush for his country. One American judge, however, has been found with sufficient judgment to approve this decision, and to assert, expressly on its authority, that a ballot without cross marks, but with the names of candidates erased with lead pencil, was to be counted for those whose names were not erased: *Coleman v. Gernet*, 14 Pa. C. C. 578; *S. C.*, 3 D. R. 500.

The Circuit Court of Appeals, Fifth Circuit, has recently decided a very interesting point of law in *Mitchell v. Marker*.

Elevators

62 Fed. Rep. 139, to the effect that a carrier by elevator, though not an insurer of the safety of his

passengers, is yet bound to exercise the highest degree of care, as a carrier by railway or stage coach; that this rule applies not only to the vehicle and machinery, but to the control and management of the means of transportation; and that it is the duty of the person who operates the elevator to give passengers a reasonable time to obtain a balance on entering the car, before beginning a sudden and rapid upward movement, having a tendency to disturb the equilibrium of one yet in motion.

In the opinion of the Superior Court of New York City, pictures painted on canvas, and cemented to the ceiling, are fixtures, and are subject to the lien of a mortgage on the building: *Cohn v. Hensley*, 29 N. Y. Suppl. 1107.

According to the Supreme Court of South Carolina, when a debtor, with intent to defraud his creditors, compromises claims with his debtors, who have no knowledge or notice of such fraudulent intent, the compromise will not be set aside: *Anderson v. Pilgram*, 19 S. E. Rep. 1002.

The Supreme Court of California has added itself to the list of those courts which hold, in contradiction of every principle of reason and justice, that a statute, prohibiting the sale of game out of season, applies to game brought from without the state, with the exception of that sold in the original package: *Ex parte Mairr*, 37 Pac. Rep. 402. This train of decision was set on foot by Chief Justice Coleridge, in *Whitehead v. Smithers*, 2 C. P. D. 553, on the totally inadequate ground that "it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter as well as of protecting other British interests, is by interfering directly with the proceedings of foreign persons. The object is, to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad." But unhappily for his lordship, no ordinary man would ever suspect that fact from the wording of the act.

This has been adopted as the correct view in a majority of the courts that have had occasion to pass on the question: *Magner v. Pro.*, 97 Ill. 320; *State v. Randolph*, 1 Mo. App. 15; S. C., 3 Cent. L. J. 187; *N. Y. Ass'n for Protection of Game v. Durham*, 19 J. & S. 306; *Roth v. State*, 7 Ohio Cir. Ct. 62; S. C. *aff.*, 37 N. E. Rep. 259; and the same rule has been applied to game killed in the state and kept in cold storage: *State v. Judy*, 7 Mo. App. 524; and to trout artificially propagated: *Comm. v. Gilbert*, 35 N. E. Rep. 454.

In refreshing contrast is the terse epigrammatic language of Chief Justice Paxson, in *Comm. v. Wilkerson*, 139 Pa. 298; S. C., 27 W. N. C. 160; 21 Atl. Rep. 14; to the effect that the object of the act being the preservation of game within the commonwealth, the court could not assume that it was intended to preserve game elsewhere; and that it would be a forced construction to hold that it was intended to exclude from the markets of the state game killed in other states, where, by the laws of those states, the killing was lawful. This view has been adopted by the courts of Michigan: *Pro. v. O'Neil*, 71 Mich. 325; S. C., 39 N. W. Rep. 1; and of Massachusetts: *Comm. v. Hall*, 128 Mass. 410. See also, *Allen v. Young*, 76 Me. 80.

There is a stronger objection to this doctrine, however, than that stated above. Many, if not all, of the statutes on this question punish the *possession* of game out of season; and it is submitted, that any law forbidding the possession of an article by a person into whose hands it has come lawfully, is an interference with the right of personal property beyond the power of any legislative body.

The judicial scrutiny of gambling transactions seems to grow steadily more severe, and any qualification of the contract, which affects the absolute ownership of the vendee, or evinces an intention to settle on the basis of differences in price, is eagerly seized upon as a badge of illegality. The Supreme Court of California, in the most recent case on the subject, *Sherry v. Shinn*, 37 Pac. Rep. 393, has ruled, that an agreement between vendor and vendee for

Gaming Contract

the sale of stock upon payment of a part of the agreed price, with a stipulation that it should be retained by the vendor as security for the balance, and only be delivered upon full payment, and that the vendor should have the right to sell it at any time, without notice to the vendee, if it should so depreciate in the market as to be worth less than three times the unpaid balance, is a sale on margin and for future delivery, and void; and equally that an agreement that the defendant should act as agent for plaintiff in buying stock for her from third parties, and pay the whole price therefor, two-thirds of which was advanced by the plaintiff, with a stipulation that the stock should be held by the defendant until the balance was paid, and as collateral security for the balance due on other stock, the title to remain in defendant while so held by him,—was a sale on margin. This case seems very near the border line.

It has been decided by the Surrogate's Court of Cattaraugus County, New York, that when a minor, ten years old, Guardian and has been brought up by a married woman, who Ward has treated him as a son, and to whom he is very much attached, the custody of the minor will not be taken away from her and given to his guardian: *Went's Estate*, 30 N. Y. Suppl. 211.

The Supreme Court of Pennsylvania has very justly ruled that when subscriptions have been secured for the purpose Injunction of building a church at a particular place, as a memorial to a certain person, an injunction will issue to restrain the church society from tearing down that building, and removing the material to a different place, for use in a building to be erected by such society at the latter place: *Cushman v. Church of Good Shepherd*, 29 Atl. Rep. 872.

In the case of *The Willamette Valley*, 62 Fed. Rep. 293, the District Court for the Northern District of California has Jurisdiction decided an interesting question as to the conflict of jurisdiction between the state and federal courts, by holding that a steamship owned by an insolvent corpora-

tion, and in possession of a receiver of the property of the corporation appointed by a state court, but employed by him in transporting merchandise and passengers in connection with the usual business of the corporation, between a port in the state and a port in another state, is not exempt, by any rule of comity, as *in custodia legis*, from maritime liens incurred in such other states, and seizure to enforce such liens by libel in the federal courts.

The Supreme Court of Arkansas has just decided, that when a lessee of a quarry agreed to pay a certain royalty on all rock sold, to furnish the lessor with copies of all contracts to deliver rock, to work the mine in a workmanlike manner, and to do a reasonable amount of work, and also agreed that a failure to perform any of these agreements should, at the option of the plaintiff, forfeit the lease; when the lessee used the quarry for two years, furnished no copies of contracts, and did not pay all the rent, but performed all the other covenants, while the plaintiff demanded no copies, till a short time before bringing action, and demanded and received rent many times after a failure to pay according to the terms of the lease; and when the lessee tendered copies of the contracts and all rents due at the commencement of the action—that under such circumstances the plaintiff must be considered to have waived his right to a forfeiture: *Little Rock Granite Co. v. Shell*, 27 S. W. Rep. 562.

In *Fish v. Capwell*, 29 Atl. Rep. 840, the Supreme Court of Rhode Island holds, in opposition to the general view, that an instrument purporting to convey all the standing wood on a certain lot of land, "with two years from date hereof, to cut and remove said wood," does not convey any interest in the land, but is a mere license or executory contract, revocable at any time before the wood is cut, and is revoked by the grantor's conveyance of the land to another. This may be true as to contracts in which the consideration is a royalty on the wood cut; but could not be justly applied to the sale of standing timber for a lump sum. In that case the contract would be executed by the pay-

ment of the consideration, or if payable *in futuro*, perhaps by the very fact of its being so fixed and determinate; and while it is unnecessary to hold that the buyer had an interest in the land, he would have the right of ingress and egress to cut and remove his property, just as in the case of a sale of standing grain, or potatoes in the ground.

The House of Lords, in *Healdett v. Allen*, [1894] App. Cas. 383, has laid down a rule that will be of great interest to all

those concerned in the [in]voluntary relief associations that have been established in connection with many large corporations. The plaintiff, on entering the service of the defendant, had signed an agreement to conform to all the rules and regulations of the defendant's works, one of which was that all employes should become members of the sick and accident club. In accordance with the rules of this club, weekly payments were made to the club treasurer by the firm on account of each employé, and from the fund thus established relief was given to members in case of sickness or accident. The plaintiff received each week a ticket, showing the gross amount of wages due her, and a weekly deduction on account of the payment to the club, the balance alone being paid her. She never required and never received any relief from the fund. After leaving the employ of the defendant she brought an action to recover the amount thus retained, alleging that it was in violation of the English statute, providing that "the entire amount of the wages earned by or payable to any artificer . . . shall be actually paid to such artificer in the current coin of this realm and not otherwise." But the lords held, affirming [1892] 2 Q. B. 662, that the retention of the club dues was not unlawful, on the principle that any payment made by an employer, at the instance of a person employed, to discharge some obligation of the employé, or to place the money in the hands of some person in whose hands the person employed wishes it to be placed, is as much a "payment in current coin" as if put in the hands of the employé himself.

The District Court for the District of Maryland has recently held that a stevedore, bringing the baggage of a passenger on

board a steamship, and placing it where requested by the passenger, is not exercising an independent employment, but is performing a duty which rests on the ship; and it is the duty of the ship's officers to see that risk of accidents to persons on board is avoided: *Unius v. The Dresden*, 62 Fed. Rep. 438.

In the opinion of the House of Lords, the failure of a station master to detain a train at the request of a passenger, in order to give an opportunity for arresting persons by whom the passenger has been robbed, and for the recovery of the property stolen, creates no cause of action against the company: *Cobb v. Great Western Ry. Co.*, [1894] App. Cas. 419.

The Supreme Court of Washington has lately afforded a curious instance of the judicial propensity to give an unsound reason for a just decision. In *Anderson v. Guinman*, 37 Pac. Rep. 449, that court held, that a substitute, hired by an employé, stands in the place of the latter, with all of its responsibilities and liabilities, so far as the master is concerned, and a fellow servant with the employé is a fellow servant with the substitute, though no contractual relation exists between the substitute and the master, and though the employé alone is responsible for the wages of the substitute. This doctrine is wholly untenable. It would lead to monstrous results if an employé could thus, by his own act, burden the master with responsibility for the acts of a substitute of whose employment he is ignorant. The master was not liable in the case under discussion, it is true, but because there was no privity between him and the substitute, not because the other servants of the master were fellow servants of the substitute. Or, if this view be preferred, the substitute was a mere licensee, or perhaps a trespasser, to whom the master owed no duty. On the other hand, if the master is ever liable to third persons for the acts of such a substitute, it is not on the ground that the act of the substitute is the act of the master, but that the master, in allowing the substitute to act, though ignorant of the fact of his acting, failed to perform a duty with which he was charged.

The Superior Court of New York City has reasserted the doctrine, abundantly substantiated by the cases cited, that the

fact that a servant was working on Sunday, in violation of the Sunday laws; when injured by reason of the master's negligence, will not preclude a recovery for such injuries: *Salars v. Manhattan Ry. Co.*, 29 N. Y. Suppl. 1123.

In *McCormick v. South Park Cours.*, 37 N. E. Rep. 1074, the Supreme Court of Illinois has decided, that where a city ^{Municipal Corporations} has repeatedly allowed property owners to erect buildings projecting into the streets, but has in each case required the plan of the proposed projection to be presented to and approved by the city authorities before it was allowed to be built, the citizens do not thereby acquire any right to build such projections without permission.

The Supreme Court of Washington has given a valuable decision in regard to the manner of voting in deliberative bodies, in *Buckley v. Tacoma*, 37 Pac. Rep. 446, by holding that when, by law, a certain proportion of the body is required to pass a measure before it, it cannot be done by a *viva voce* vote, on the ground that "in no case where a fixed proportion of members must vote to carry a measure, is it possible to ascertain the result by the *viva voce* plan."

The Supreme Court of Missouri holds, that it is, as a matter of law, actionable negligence for a manufacturer to obstruct for ^{Negligence} weeks the street in front of his premises for the purpose of receiving and discharging his goods: *Gerdes v. Christopher and Simpson Architectural Iron and Foundry Co.*, 27 S. W. Rep. 614; but according to the Circuit Court of Appeals, Fifth Circuit, in the absence of a statute giving a remedy, a city is not liable for damages for the taking of human life by a mob, although its officers may have been negligent in preserving the public peace: *New Orleans v. Abbagato*, 62 Fed. Rep. 240.

The Supreme Court of South Dakota has recently ruled that the constitutional prohibition against changing the compensation of any public officer "during his term of ^{Officers} office," does not apply to a deputy appointed by an officer to hold during the pleasure of the latter, as the word

"term" applies to a fixed period: *Somers v. State*, 59 N. W. Rep. 962. See *State v. Johnson*, (Mo.), 27 S. W. Rep. 399.

The Supreme Court of Minnesota adheres to the doctrine that partnership capital invested in land for the benefit of the partnership will be treated as personalty, and not be subject to dower or inheritance, until it has performed all its functions to the partnership, and has thereby ceased to be partnership capital, and that accordingly the inchoate title of the wife of a partner attaches to only that part of such real estate remaining *in specie*, unconverted, after the complete termination of the partnership: *Woodward-Holmes Co. v. Medd*, 59 N. W. Rep. 1010.

The Supreme Court of New Hampshire holds an instrument for the payment of money at the death of the maker good: *Martin v. Stone*, 29 Atl. Rep. 845; and the Supreme Court of Idaho has ruled, that a note without grace made payable in a bank, placed and remaining therein for collection, till due, may be sued upon after banking hours on the evening of the day it falls due, when the opening and closing hours are well known to the maker: *Sabin v. Burke*, 37 Pac. Rep. 352.

According to the Supreme Court of Florida, a plea of *non est* is not proper in proceedings on an information in the nature of a *quo warranto*, at the relation of a private person, upon refusal of the attorney general to institute suit; for in such a proceeding, when the relator has shown a *prima facie* right to the office, the respondent must show by what title he holds: *Buckman v. State*, 15 So. Rep. 697.

In *Chicago, R. I. & P. Ry. Co. v. Stahley*, 62 Fed. Rep. 363, the Circuit Court of Appeals, Eighth Circuit, has decided that when a statute of one state, which has there received a settled construction, is adopted in another state, and the Supreme Court of that state puts a different construction upon it, the latter construction will be accepted by the Federal courts as the true construction within that state.

In the opinion of the Supreme Court of Pennsylvania, a requirement that a claim for damages against a telegraph company must be presented within sixty days is not reasonable in the case of a message sent from Philadelphia to Shanghai, from which no answer would come in the ordinary course of business, except by mail: *Conrad v. Western Union Tel. Co.*, 29 Atl. Rep. 888.

According to the Supreme Court of Pennsylvania, a title conditioned that no mill, factory, brewery or distillery shall be erected on the premises, will not satisfy a stipulation in the agreement of sale that the title shall be good and marketable, and clear of all incumbrances: *Bailey v. Foerderer*, 29 Atl. Rep. 868.

The Circuit Court for the District of Indiana has recently held, discountenancing *Jenn v. Pa. Co.*, 36 N. E. Rep. 159, and the other Indiana cases cited, that the superabundant waters of a river, at times of ordinary flood, spreading beyond its banks, but forming one body and flowing within their accustomed boundaries in such floods are not surface waters, which a riparian owner may turn off as he will: *Cairo, V. & C. Ry. Co. v. Brevoort*, 62 Fed. Rep. 129.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. S. Ellis, Esq., 726 Drexel Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY. By C. ELLIS STEVENS, LL.D. New York: Macmillan & Co. 1894.

COMMENTARIES ON AMERICAN LAW. By JAMES KENT, LL.D. Edited by WM. HARDCASTLE BROWN, A.M. St. Paul: West Publishing Co. 1894.

HANDBOOK OF COMMON LAW PLEADING. By BENJAMIN J. SHIPMAN. St. Paul: West Publishing Co. 1894.

NEW ROADS AND ROAD LAWS IN THE UNITED STATES. By ROY STONE, Vice-President of National League for Good Roads. New York: D. Van Nostrand & Co. 1894.

A TREATISE ON THE LAW OF WILLS AND ADMINISTRATORS, with Special Reference to the Tennessee Statutes and Decisions. By ROBERT PRITCHARD, of the Chattanooga Bar. Chattanooga: Pritchard & Sizer. 1894.

A TREATISE ON THE LAW OF RES JUDICATA, including the Doctrines of Jurisdiction, *Par* by *Suit* and *Lis Pendens*. By **HUKM CHAND, M.A.** Printed at the Education Society's Steam Press, Byculla, Bombay. William Clowes & Son, London. William Green & Sons, Edinburgh. 1894.

THE NATURE OF THE STATE. By **DR. PAUL CARUS.** Chicago: The Open Court Publishing Co. 1894.

SELECTED CASES.

A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW. By **JOSEPH HENRY BEALE, JR.,** Assistant Professor of Law in Harvard University. Cambridge: Harvard Law Review Publishing Association. 1894.

AMERICAN ELECTRICAL CASES, being a Collection of all the Important Cases (excepting Patent Cases) Decided in the State and Federal Courts from 1873 on Subjects Relating to the Telegraph, Telephone, etc., with Annotations. Edited by **WILLIAM W. MORRILL.** Vol. I (1873-1885). Albany, N. Y.: Matthew Bender. 1894.

BOOKS OF REFERENCE.

TABLES FOR ASCERTAINING THE PRESENT VALUE OF VESTED AND CONTINGENT RIGHTS OF DOWER, CURTESY, ANNUITIES AND OTHER LIFE ESTATES; DAMAGES FOR DEATH OR INJURY BY WRONGFUL ACT, ETC. Based chiefly upon the Carlisle Table of Mortality. Computed and Compiled by **FLORIAN GIAUQUE** and **HENRY B. MCCLURE.** Cincinnati: Robert Clarke & Co. 1894.

PAMPHLETS.

GREAT DISSENTING OPINIONS OF THE SUPREME COURT OF THE UNITED STATES. A paper read at the Seventeenth Annual Meeting of the American Bar Association (1894). By **HAMPTON L. CARSON**, of the Philadelphia Bar.

PROBLEMS AND QUIZ IN COMMON LAW PLEADING. By **EARL HOPKINS.** St. Paul: West Publishing Co. 1894.

BOOK REVIEWS.

A TREATISE ON THE FOREIGN POWERS AND JURISDICTION OF THE BRITISH CROWN. By **W. E. HALL.** Oxford: The Clarendon Press. London: Stevens & Sons, Limited, New York: MacMillan & Co. Price, \$2.60. 1894.

The editors have received the above work, written by **WILLIAM E. HALL**, the celebrated English barrister, whose well-known text-book on "International Law" has already run through three editions and has placed its author in the front rank of modern English writers upon this subject. The best proof of Mr. HALL's standing in this respect, upon this side of the Atlantic, is the fact that it is the standard text-book on international law in use at the present time at Harvard University.

The subject of Mr. HALL's latest production is necessarily

more restricted in its scope than his earlier work. Much of what he has to say is confined in its application to Great Britain only, and in this respect it differs materially from the majority of the books which are reviewed in these columns. Thus, it contains paragraphs upon such subjects as the status in England of naturalized aliens, naturalization in the colonies, the legality under British statutes of marriages in foreign countries, the powers of British consuls, the jurisdiction of the Crown in the countries of the East and other semi-civilized regions. These sections of the book obviously have no general application except in cases where some question has arisen involving a British statute. On the other hand, there are other sections which would be quite as valuable to the American lawyer as to his British confrère. Thus, the admirable discussion in Chapter IV, of the jurisdiction of the Crown on the high seas, treats of a much-discussed question of international law of quite as much interest here as there. The members of our Bar, if the occasion should arise, will find of great practical value Mr. HALL's remarks on such subjects as the rights of a State with reference to its subjects abroad, changes of nationality, extra-territorial marriages, and diplomatic agents.

Mr. HALL's style of composition has always been distinguished for its clearness combined with the quality of great compactness. His statements are classified in paragraphs, appropriately summarized in short marginal notes. This style of arrangement renders the book very easy reading, and one which is very convenient to refer to in search of extracts and references. At the end of the book the author has introduced a system of indices which is a considerable advance upon those generally found in law books of this class. They are five in number, and cover in succession the following topics: Statutes, Orders in Council, Cases, Treaties, and, lastly, the General Index. The use of the book for purposes of practice is greatly aided by this feature of it. The general appearance of the book does great credit to the English publishers, and also to MacMillan & Co., who are the publishers in this country.

THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM. By MAXIMUS A. LESSER, A. M., of the New York Bar. Rochester, N. Y.: The Lawyers' Co-operative Publishing Co. 1894.

The author in his preface has rightly described this work when he says that his claim for consideration is based rather on "originality of treatment and presentation of materials at hand than on originality of research." The book is a careful compilation of the opinions of other writers on the different subjects treated, with copious and well selected extracts from their works. The work may be divided into two parts; first, a description of the institutions providing for the trial of the facts of a cause in other systems of jurisprudence; and secondly, a history of the jury system as developed in England from a combination of Norman ideas of administration and the character of a judge, with the old Anglo-Saxon procedure. Thus Chapter II is a description of the Dekarts of Greece, consisting in the main of extracts from GROTE'S HISTORY, and Chapter III treats of the Judices of Rome. When we come to the second part, or history of the jury proper, the extracts from Forsyth naturally increase, in fact Mr. LESSER, follows in the main the arrangement and endorses practically all the opinions of that learned author.

There are one or two statements by the author, or rather statements cited by him with approval, that would bear some modification. For instance, is it correct to say that Roman judicial procedure was to a great extent derived from and formed by that of Athens, see p. 29; or that King Alfred restored the hundred in England, p. 40. It is true in the last case that the first mention we find of the hundred in England is in the laws of Alfred, but the very irregularity of the boundaries of the hundred, and its subsequent importance seem to indicate not only its prior existence, but that the king simply adapted to his own purposes a living institution.

W. D. L.

CEDURE. By EDWIN E. BRYANT. Boston: Little, Brown & Co. 1894.

This work is a welcome addition to the "Students' Series." The author is well known as the Dean of the Law Faculty of the University of Wisconsin, and his experience as a teacher of law has stood him in good stead in gauging the wants of students in respect of a concise treatise on Code Pleading. Before beginning his discussion of the code system, Professor BRYANT gives a condensed account of courts of law and the common law system of pleading, and a summary view of courts of equity and of pleadings therein, as well as of the civil law system of pleading. If the modern law student cannot make a careful investigation of pleading at common law, preparatory to his study of code pleading, he will find it well worth his while to read the concise statement which occupies some thirty-five pages of Professor BRYANT's work. The statement of the rules of pleading is, indeed, as the preface points out, "merely a condensed summary of those rules as given in STEPHENS's admirable treatise," while the sketch of the equity system "follows the arrangement of Lord REDFORD and STORY." But the reader will be quite ready to concede the author's claim of novelty in "the combination of a condensed summary of the common law rules of pleading, an outline of the equity system of pleading, a general statement of the code system as now exhibited by statute and interpretation, and an analytical index of the code provisions relating to pleading in the twenty-seven code states and territories.

As the author has elected to stand or fall with STEPHENS's method of treating pleading at common law, he must face the criticism to which the work of that distinguished writer is believed to be open—the criticism, to wit, that it fails to attach sufficient importance to the scope of the issues raised by the several traverses, and thus fails to impress upon the mind of the student the vital connection between the system of pleading, and the law of evidence. Perhaps, this failure is particularly to be regretted in an introduction to the study of code pleading, for the student will be too apt to overlook

what is believed to be one of the most serious objections to the code system—namely, the waste of time in the trial of causes which results from the obliteration of the “issue,” and the consequent admission of vast quantities of irrelevant testimony. This is, perhaps, the only adverse criticism of the book that can with fairness be made. All else is unqualified praise—both as to arrangement, analysis and exposition.

G. W. P.

OUTLINE STUDY OF LAW. By ISAAC FRANKLIN RUSSELL, D.C.L., LL.D. New York: Baker, Voorhis & Co. 1894.

A layman or a prospective student of the law who wishes to understand the very general doctrines of jurisprudence and to obtain a clear impression of the fundamental principles which regulate the relationship of citizens to each other and to the state would be well to read Professor RUSSELL's work as a starter at least. As the preface states, the book is a collection of forty-eight lectures, “mere summaries of what was much amplified when presented orally,” combining the consideration of international law, constitutional law, and civil polity, with the various subdivisions of municipal law. There is, of course, much that applies only to the state of New York (the work is primarily designed as a preparation for study there) but the first fifteen lectures are devoted to a broader field.

The author's style is truly original. It is forceful, clear and emphatic. But we wish he had not been compelled or persuaded to reduce to such very thin consistency some of the fifteen chapters above referred to. The process of condensation and reduction has, we fear, impaired the constitutional strength of the subject. This is especially true of “Equality Before the Law” and “Studies in Constitutional and Political History.” The titles of these chapters suggest a boundless field of fascinating research. A glance at their contents reveals the very limited extent to which the author takes us.

The work, however, is intended as an outline as we said before, so that the above criticism amounts to a mere regret. The very brevity of the book, combined with its

interesting, even entertaining style, should tempt the student or lay reader to pursue the subject to greater depths, and this is presumably the object most desired by the author.

W. S. E.

THE LAW OF A MASTER'S LIABILITY FOR INJURIES TO THE SERVANT. By W. F. BAILEY, one of the Judges of the Circuit Court of Wisconsin. St. Paul, Minn.: West Publishing Company. 1894.

It may be safely said that there is no branch of the law which has developed at so rapid a pace within the last few years as that which treats of the liability of the master for injuries to his servants. It affords a splendid field for the efforts of the legal literary harvester, as the ripeness of the subject renders it exceedingly interesting. It is pleasant to think that a lawyer and a scholar of Judge BAILEY's ability should have been selected for the work, and the wisdom of the selection is evidenced by the very able discussions of the principal cases and the scholarly arrangement.

Chapters I to VIII, inclusive, treat of the various duties of the master to the servant.

Chapters IX, X and XI, of the risks assumed by the servant.

Chapters XII, XIII, XIV, XV, XVI, XVII and XVIII, of fellow-servants.

Chapters XIX, XX and XXI, of contributory negligence.

Chapter XXII, of independent contractors.

Chapter XXIII, of contracts limiting liability.

Chapter XXIV, of contracts releasing claims.

Chapters XXV, XXVI and XXVII, of procedure.

The great body of case law which is annually introduced by the Appellate Courts of the various States renders complete digesting almost impossible, except when confined within very narrow districts. It is necessary, therefore, for text writers to specialize, taking up some important branch or sub-division of the law and reducing the decided cases bearing upon it to something like a system. But the great difficulty

seems to be, and, in fact, it is the one objection which we can see to this very careful and conscientious work, that the text writer, in order to make this book of a respectable size, devotes considerable space to the discussion of subjects only indirectly connected with the apparent scope of the work. Thus, we find in Chapters XX and XXI a very lengthy discussion of the doctrines of contributory negligence, which, while very much in order in a work of negligence, seems hardly proper in a work covering the law of a Master's Liability for Injuries to his Servant. But these instances are rare in Judge BAILLEY's book, and even though they may be objectionable from a standpoint of a perfect text-book, they are, nevertheless, valuable contributions to the literature of this subject.

The citation of cases is very full and complete throughout, and the index carefully prepared. The "externals" are in excellent taste, and we take great pleasure in recommending this work to the profession as a valuable addition to the literature of the law relating to master and servant.

JOHN A. MCCARTHY.

RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS. By CHARLES CHAUNCEY BINNEY, of the Philadelphia Bar. Philadelphia: Kay & Bro. 1894.

The substance of Mr. BINNEY's work exceeds the limits naturally inferred from the title. Without being a great work it is nothing less than a scholarly exposition of the whole question of local and special legislation in this country as it stands to-day viewed in the light of numerous decisions from the courts of many States. It is, as far as we know, the only work upon this at once theoretically interesting and practically important subject.

The first chapter takes up the subject in a general descriptive way under the heading "The Treatment of Local and Special Legislation in England and the United States. Chapter II points out the distinctions between general, local, and special laws. Chapter III is devoted to the essential point of classification (*i. e.* the arrangement into groups of the individuals who

are the subject of legislation). The succeeding chapters deal with the effect of the restrictions upon local option, and the control which they exercise upon legislative discretion. The main body of the work is admirably supplemented by a thoroughly useful descriptive list (Chapter V) of the "Restrictions Actually in Force in the United States," classifying the restrictions with regard to the subjects affected by them, and containing a reference to the location of the restrictive clauses in the various constitutions.

Excepting the criticism that the first and second chapters might well change places, the arrangement of the book is clear and logical. The work belongs to that class of legal productions which may be described as treatises not without the useful features of the text-book pure and simple. It is of practical value in the preparation of a constitutional brief, as well as instructive to the student.

The notes, index and list of cases referred to are sufficient. The form of the volume is convenient, and the printing excellent.

W. S. E.

PRECEDENTS AND FORMS OF INDICTMENTS, INFORMATIONS, COMPLAINTS, DECLARATIONS, PLEAS, BILLS IN CHANCERY, ANSWERS, REPLICATIONS, DEMURRERS, ORDERS OF COURT, BONDS AND WRITS, Adapted to practice in United States criminal and civil cases, together with forms and instructions pertaining to the accounts and fees of United States attorneys and commissioners. By OLIVER E. PAGIN, Assistant United States Attorney for the Northern District of Illinois. Chicago: Callaghan & Company. 1894.

The contents of this book are fully indicated by its title. It contains 629 forms for criminal cases, 125 for civil and 14 for accounts and fees of United States attorneys and commissioners, in all 768 forms. First are given general forms for indictments and other pleadings, and for complaints before United States commissioners, warrants, etc. Their arrangement then follows the title "Crimes and Offences" in the Revised Statutes: Crimes against operations of the government, elective franchise, official misconduct, against justice,

under maritime jurisdiction, counterfeiting, postal crimes, relating to merchant seamen, under internal revenue laws, and miscellaneous offences, under which latter head are forms for indictments under section 5209, relating to embezzlement and misapplication of funds of national banks. The forms for civil cases are arranged under the titles, admiralty, customs, internal revenue, post office and miscellaneous. Under the title, accounts and fees of United States attorneys and commissioners, are given the forms for accounts and the certificates to be attached thereto; also the sections of the Revised Statutes relating to this subject, instructions issued by the Treasury Department, regulations prescribed by the accounting officers, and memoranda of decisions of the courts. The book contains throughout notes with references to cases in which disputed points of pleading have been passed upon. There is a table of contents, table of cases (with volume and page of the report) and, which is most important, a very full index with cross references. The author has compiled his book with care and skill, and has spared no pains to make it complete. Its value can perhaps be fully appreciated only by those who are daily engaged in the drafting of indictments and other pleadings in the United States courts. To them the book fills a long felt want and will be a welcome assistance.

ROBERT RALSTON.

NOTE.—On account of lack of space the reviews of the following works are postponed until the November number: A Treatise on Disputed Handwriting, etc. By Wm. E. Nagam. A Legal Document of Babylonian. By Morris Jastrow, Jr., Ph.D. An Illustrated Dictionary of Medical Botany, etc. By George M. Gould, A.M. Digest of Insurance Cases. By John A. Finch. Vandegriff's Tariff Manual. Jewett's Election Manual.

The Editors offered two prizes for the best and second best Annotations by members of the graduating classes (Class of 1894) of the various Law Schools of the country. They take pleasure in awarding the first prize to Mr. Edgar H. Rosenstock of Cornell, 1894, for his Annotation on "Warranty;" and the second prize to Miss Mary M. Bartelme of the Class of 1894, of the Northwestern University Law School of Chicago, for her Annotation on "Contracts to Make Wills;" both of which Annotations appear in the pages of this number.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

NOVEMBER, 1894.

THE ANGLO-SAXON LAW SUIT.

By WILLIAM DRAPER LEWIS, Ph.D.

One of the most common mistakes to which a student of history is liable is to criticise past ages from the standpoint of the age in which he lives. This error we apply in our criticism of William the Conqueror. William the Conqueror is condemned for his harsh and cruel actions, for renewing the old customs, for his harsh criticisms of the old habits of the Anglo-Saxons, for his harsh treatment of foreign warriors, and for his harsh treatment of the Anglo-Saxons and fifth century. The particular idea of the Anglo-Saxons is that some customs are better than others, and getting the better of the Anglo-Saxons is a thing is a mistake. The Anglo-Saxons are mercantile. It is a mistake to think of the Anglo-Saxons as a condition of a large number of Anglo-Saxons in the Anglo-Saxon world of mercantile civilization. The Anglo-Saxons are a civilization where war, and where

of gold in the coffers of the army in the field as on the amount of amunition, or on the bravery of the men, a policy which gathered in the country large stores of gold, and which looked upon the favorable balance of trade as the *sine qua non* of national prosperity, was perhaps one eminently suited to the conditions of mediæval life—one dictated by a wiser and more profound knowledge of those conditions than exists among the critics of the present day. In the domain of law, it is no uncommon thing for some tyro to point the finger of ridicule at the strictness of ancient pleading and the apparent arbitrariness of technical rules; especially does he, as we have seen him, ridicule the compurgation and ordeal of his Saxon ancestors with their apparent total lack of appreciation of the rules of evidence, or ideas of equity.

In this paper, we simply wish to point out some of the conditions of Anglo-Saxon life, which rendered their conception of a suit at law infinitely more serviceable for the correct administration of justice than our own modern ideas would have been.

The main features of the Anglo-Saxon suit are probably familiar to all the readers of *THE AMERICAN LAW REGISTER AND REVIEW*. The plaintiff himself summoned the defendant to court. A court was not a court in the modern sense of that term. To us it is composed of one or more judges learned in the law. These judges are officers of the government. The judge or judges, sitting in a manner which the law directs, is the court. The court, to the Anglo-Saxon, was the general assembly of all the free men of the district; the larger the district the larger and more important the assembly. The County court was more important than the court of the Hundred. These assemblies had a presiding officer—a hundred's earldor or a shire's gerefæ; but the presiding officer was not the court. The court was the whole body of attendant freeman. In this assembly the plaintiff made his claim. Suppose it was a suit for a debt, the plaintiff might say: "In the name of the living God, as I money demand, so have I lack of that which the defendant promised me when I mine to him sold." Then the defendant was called upon to answer.

He brought forth no facts to show the reason he was not indebted, just as the plaintiff had brought forth no facts to prove that he was indebted. His choice was simply to admit the debt or deny the debt, and if he denied it, to deny it in the words of the charge. Thus, the direct denial of such an assertion would be: "In the name of the living God, I owe not to the plaintiff scatt, shilling, or penny or penny's worth, but I have discharged to him all I owed him, so far as our verbal contracts were at first." Here was a direct assertion and a direct denial: a fact in issue, as we would call it; a fact, the truth of which was with us to be determined by a judicial investigation of the evidence. Not so with the Anglo-Saxon court.

There was a direct assertion and a direct denial, and the Saxon said: As both offer to prove their assertion, we will only allow one to do so. If he succeeds in proving his assertion, then the matter will end; if he does not succeed, then the judgment will go against him. Therefore, the judgment followed instantly on the direct assertion and the direct denial. The defendant in such a case would have the privileges of the proof. That is to say, he would be permitted to prove his denial, and if successful, that proof would clear him from the suit.

There might be circumstances in which the plaintiff would have the proof. For instance, supposing A claimed that he had lost his horse as the result of a theft, and that the horse was now in B's possession. He charged B with having taken it. B might be innocent of the theft. We may suppose that he might have bought the horse from C, who had stolen it from A. In such a case, if he denied the theft, and claimed that the horse was his from birth, of course, the direct denial gave to the defendant the proof; but if he failed to prove his assertion he would then be liable as a thief. Not caring to run this risk, he might claim that he had bought the horse from C, believing it to be C's of right. In such a case, the defendant was allowed to clear himself by the ordinary proof from the charge of theft, and the plaintiff had the proof so far as the ownership of the horse and the original theft was concerned.

The proof itself was not evidence adduced before the court, of the sufficiency of which evidence the court judged in each case. But for all cases there was a definite rule as to the amount of proof and kind of proof necessary to establish an assertion. This proof never consisted, as in a modern suit, of a fact tending to show the existence or non-existence of the fact in issue. This is made clear when we perceive the three kinds or classes of proofs allowed. The first was that of oath with witnesses; that is to say, if the defendant procured a certain number of persons, differing according to the respective social status of the parties to the suit, to swear that they believed him to be telling the truth, that was sufficient to satisfy the requirements of the proof. Or, he who had the proof might procure a certain number of transaction witnesses, or witnesses who would swear that they had been present at the sale in the case which we have before described, and had seen, with their own eyes, the money actually paid by B to A. The second method of proof was that of ordeal, in which the defendant appealed to the Deity to prove that his assertion was correct. This solemn appeal was made in certain prescribed forms. For instance, the ordeal of cold water, practically used, like all other ordeals, exclusively in criminal cases, was one in which the accused, who had appealed to the ordeal, was thrown into a pond or stream of water, where, if he sank, he was innocent, and if he floated, it was considered conclusive that he was guilty. Besides the ordeal of cold water we have those of hot water, and morsel. The third method of proof was that by document. This was used principally in suits concerning land, and probably only after the introduction of Christianity. It consisted in the production by the party who had the proof of a written document establishing his assertion.

There arise, in the modern mind, many practical objections to such an administration of justice as is here described. In the first place, the very claim on the part of a plaintiff, without any proof advanced by him to substantiate that claim, will put the defendant in the position of submitting to the plaintiff's claim, unless he can prove his denial by one of three arbitrary methods. Again, there is no investigation of the facts. A

man who has a perfectly valid claim may lose it because an unscrupulous adversary has denied it under oath, and has hired, or in some manner procured, the requisite number of persons to swear that they believed him.

These objections are perfectly valid, but we can imagine that the Anglo-Saxon, if he were here to-day, could urge two valid reasons why the conclusion which we are at first tempted to draw, does not follow. It would not have been better for him to instantly substitute the modern conceptions of a suit with its fact in issue and investigation by a jury under the direction of the court of that fact. In order to investigate and weigh evidence, two things are requisite—time and the machinery suited for such an investigation. Now, there is no doubt that the court of the Anglo-Saxons had not time to investigate and weigh the facts of every case which was brought before them. They were called together in the open air. They came from all parts of the shire or hundred, and all were more or less anxious to return to their various occupations. Even had they the time, any attempt to decide each case on its merits would have resulted in the worst of all judicial tribunals—a tribunal in which the basis of decision was the whim of the populace.

The *Dikasts* of Greece are a notorious example of popular tribunals undertaking the decision of judicial questions. Practically no system of law grew up in Greece because of this attempt of a comparatively primitive people to investigate the facts of each case—*i. e.*, to decide the dispute by popular vote. But why, it may be asked, did they not institute a regular court with a single judge; why not leave the question of fact to be investigated by the sheriff, or referred to a single man for arbitration, or a body of men, like the jury? Decisions of a court, so called, are useless unless they are respected, and the complete answer to this objection is that the Anglo-Saxon would not have abided by the decision of such a tribunal. To have the decision of a court or arbitrator conclusive on the parties, the judge must wield arbitrary power, or be a person in whom the litigants have entire confidence. Arbitrary power, whether of king or judge, such as we know

unsatisfactory even to the people of that time. The celebrated expression in the case of Wynflæd and Leofwine is used to prove this. It is as follows: "Then would have followed the whole full oath of both men and women; but the Witan who were there said it would be better to omit the oath rather than give it, because after the oath there could be no amicable arrangement:" *Essays on Anglo-Saxon Law*, p. 356; *Cod. Dip.*, DCXCIII.

The large number of suits, however, settled, and this suit in particular, do not show, it seems to us, that the methods of Anglo-Saxon legal procedure were unsatisfactory to the people, but that in many instances, if carried to their legitimate conclusion, the state would not have accomplished its primary object in interfering between the disputes of private individuals. That primary object is not the administration of justice, the determination of the right between man and man, but the final settlement of a controversy which would otherwise be continued indefinitely by personal altercation and violence. When the assembly, perceiving, as it must often have perceived, that the judgment of the court in strict legal form would not have pacified the disputants and ended the quarrel, then the friends of both parties stepped in and effected a compromise. In doing this, they did not attempt to reach an equitable conclusion, as would have been the case to-day, but a conclusion which both parties would abide by; or, perhaps, that which was more likely to occur—a conclusion which the stronger party would submit to, when such party would not have abided by a decision entirely against him.

Finally, one word as to the technicality of the procedure; that if the defendant, in denying the claim of the plaintiff, stumbled or hesitated, or did not deny in the strict formula prescribed by law, he lost his case. This strictness, which seems to us at first only the dictate of imaginary and useless consistency, was, we believe, in fact necessary to obtain any regular administration of justice at all among not only the Saxon, but any primitive people. If any latitude had been allowed to the defendant in denying, or the plaintiff in stating his claim, a slight variation might have brought forth a ques-

tion as to whether the denial was a denial or not. 'Now, questions of this kind the Saxon tribunal, as the primitive tribunal of all peoples, was wholly incompetent to decide. The strictness and technicality of the rules were necessary in order to avoid the possibility of all such nice questions as whether a fact in issue had been raised.

We have said these few words in answer to a common criticism of the institutions of a past age. Its value, perhaps, is slight, except the ethical one, that we should not misjudge those who have gone before us. For, if we are careful to judge from the standpoint of past conditions, past ideas and institutions, our descendants, following our good example, will be more lenient than they otherwise would be with respect to some of our own ideas and actions.

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HATTERSLY ET AL. V. BISSETT ET AL.¹ NEW JERSEY COURT OF ERRORS AND APPEALS.

The testator by his will devised a portion of his real estate to his son, and other portions to his daughter. After the execution of his will he conveyed to his daughter part of the real estate he had devised to his son. On bill filed by the son to compel the daughter to elect whether she would take under the deed or under the will; *Held* (1), That the conveyance by the testator, after the execution of his will, of the lands devised to the son, operated as a revocation of the devise to the son. (2) That the daughter was not under an obligation to make an election between the conveyance to her by deed, and the benefits to be derived under the will.

SUBSEQUENT DEALINGS, BY THE TESTATOR, WITH DEVISED PROPERTY.

While this case presents no very difficult or novel question, it contrasts clearly the two doctrines, of equitable election and what is known as the "revocation" of a devise, by the subsequent alienation of the property devised; and illustrates happily the nature of each of these doctrines.

The object of this annotation will be to examine into the present state of the law in America, as regards the effect produced upon devises by subsequent dealings, on the part of the testator, with the devised property.

¹ Reported in 29 Atl. Rep. 187.

The precise point of the principal case was decided, in South Carolina, as long ago as 1847, in the case of *Thompson v. Thompson*, 2 Strob. 48. There, the testator, long after the date of his will, conveyed land therein devised to A, to B, who was also a devisee under the will; and it was held that the testator thereby gave to B the land in addition to that given by the will, and that the doctrine of election did not apply. As quoted in the principal case (p. 190) the court there said, "When the testator gives his own estate to one person, and the estate of that person to another, the intention is manifest that the second devisee shall have the estate of the first, and that intention creates a condition that the first devisee shall not take the estate given to him unless he relinquish his own estate to the person to whom the testator has devised it. If, in this case, the testator had first conveyed the plantation to the defendant, and afterwards devised it to the plaintiff, the defendant could not take by the conveyance without defeating the devise to the plaintiff. To take his own estate by the deed, and, in addition, claim what was given by the will, would be against the intention of the testator; and the defendant would be put to an election, either to take under the deed, and relinquish his claim under the will, or to take under the will, and relinquish to the devisee the plantation claimed by the deed. But the conveyance to the defendant was made after the date of the will. By it the devise to the plaintiff was revoked, with the same effect as if the plantation had been devised to the defendant by a codicil. It was the intention of the testator that the defendant should take both under the deed and under the will, and there is no subject for election."

At the outset it seems imperative, in the cause of clearness and consistency, to quarrel with the common nomenclature of the doctrine which is to be considered.

The error, if error it be, dates far back; for, in the earliest reported decisions, there are numerous loose expressions to the effect that alienation or other dealing with the property devised effected a *revocation of the will*: *Powell*, 377; *Dister v. Dister*, 3 Lev. 108; *Cotter v. Laver*, 2 P. Wms. 623;

Sparrow v. Hardcastle, 3 Atk. 798; *Marwood v. Turner*, 3 P. Wms. 163; *Walton v. Walton*, 7 Johns. Ch. 258. When this rule came to be practically applied, it was soon made obvious that a literal interpretation would lead to undesirable results; and the phrase was modified by saying that the revocation would be *pro tanto* only; that, so far as other property was concerned, the will would continue to operate. And a still nearer approach to accuracy was made, when the revocation was said to be, not of the will, but of the *devise*. Yet, the courts have adhered to the traditional term "revocation," and this in spite of frequent animadversions from judges and text writers to the effect that the word should never have been dragged into this connection at all. Even, with its later qualifications, although it may lead to no serious mistakes, it offends against that accuracy and nicety of expression which ought ever to characterize legal language.

One does not find decisions to the effect that when a testator parts with the subject-matter of a specific legacy, the will, or the legacy either, is "*revoked*." The phrase used is "*ademption*." The will remains as valid as ever; it is not revoked in whole or in part; but a portion of it is deprived of effect, merely because there is nothing for it to operate upon. How is the case altered by the substitution of real property for personal?

The technical limitation of the word "*ademption*," to personal property, might be an objection to its use here; but surely it would be better to stretch that meaning, or to employ a circumlocution, than to use a word, which, though sanctioned by tradition, is worse than meaningless.

The whole matter was very well stated by Weston, J., in *Carter v. Thomas* (4 Greenl. 341), decided in 1826. He says: "By the *revocation* of a will we generally understand an act by which the will ceases to have any effect. And this may be considered the meaning of the term, strictly and accurately speaking. It is not, however, uniformly used in this sense by legal writers, or in English judicial opinions; but it is frequently applied to cases where the will operates upon some estate, but not upon others, by reason of some conveyance or modi-

fication, made therein by the testator in his lifetime. When therefore, this position is laid down generally, that an alteration made in the estate devised, amounts to a revocation of the will, we must understand the meaning to be, so far as such alteration is inconsistent therewith. When a portion only of that which is the subject-matter of the will is parted with by the testator in his lifetime, the will cannot have the effect originally intended; and whether the whole will remains, but partially defeated in its operation, or such alteration is regarded as a revocation *pro tanto*, the will has its effect upon the estate which is left unaltered."

While the courts have clung to the traditional expression, they have not allowed it to lead them astray.

No reported case actually holds that any dealing with part of the devised property works a revocation of the entire will. The revocation is only *pro tanto*, and the remainder of the instrument stands unaffected: *Harkness v. Bayley*, Prec. Ch. 575; *Tucker v. Thurston*, 17 Ves. 134; *Clark v. Bukeley*, 2 Vern. 730; *Coke v. Bullock*, Cro. Jac. 49; *Livingston v. Livingston*, 3 Johns. Ch. 155; *Adams v. Winne*, 7 Paige, 97; *Vandemark v. Vandemark*, 26 Barb. 416; *Coulson v. Holmes*, 5 Sawy. C. C. 279; *Hawes v. Humphrey*, 9 Pick. 350; *Floyd v. Floyd*, 7 B. Mon. 290; *Clingen v. Michtree*, 31 Pa. 25; *In re Tillman's Estate*, 31 Pac. 563 (Cal.).

In Massachusetts it has been held that where a testator disposed by will of his entire estate, and subsequently sold all of his real estate, and died possessed of personalty alone, the will stood as a will of personalty, and was, accordingly, revocable by any writing sufficient to revoke a will of personal estate: *Brown v. Thorndike*, 15 Pick. 388.

Although the point has often been made in argument, that, if the alienation or alteration of part of the property devised, operates a revocation of the will, then such revocation ought to be a bar to the probate of the will, the courts have always steered clear of this dangerous doctrine.

So, in South Carolina, where a testator sold all his lands and part of his personalty after the date of his will, this was held no obstacle to the probate: *Prater v. Whittle*, 16 S.

Car. 40 (1881); also, *Balliet's Appeal*, 14 Pa. 451 (1850); *Harris v. Humphrey*, 9 Pick. 350 (1830); *Coulson v. Holmes*, 5 Sawy C. C. 279 (1878). In *McRainy v. Clarke*, 2 Taylor, 278 (N. C. 1816), it was said that by the sale of certain lands, subsequent to the making of a will devising them, "the will would not have been revoked, properly speaking, so as to prevent its probate; but the only effect would be an *ademption* of the devise of the particular lands conveyed." See also *Hoitt v. Hoitt*, 63 N. H. 475 (1884).

Cases where the testator had parted with his whole estate, so that he died possessed of nothing upon which the will could operate, seem to have presented somewhat more difficulty, though it is obvious that they differ from the former class only in degree. But, although these are loose expressions here and there, the actual decisions are consistent and reasonable.

In a recent New Hampshire case, the court came to the conclusion that, in that State, at least, the common law has been so modified "as to raise the question whether a case can now arise of a total revocation by implication of law, when there is any estate upon which the will can operate." "And a case is possible," said they, "where a will may operate to control the appointment of an administrator or guardian, even if there is *no estate* to be transmitted by it. . . . A will may be a mere appointment under a power. The question whether a will is entitled to probate does not depend upon the question whether, at the time of the testator's death, or at any previous or subsequent time, there was any property which it could dispose of:" *Morrey v. Schirr*, 2 N. Eng. 269 (N. H. 1886). See also, *In re Tillman's Estate*, 31 Pac. 563 (Cal. 1892).

So far as appears, in only one reported case in America, has the court, through too close a dependence upon the letter of authority, made the error,—which might be a serious one,—of holding, that where a testator makes a deed to all the property which he has devised by his will, the act amounts to a revocation of the will, and may be pleaded in bar to its probate: *Epps v. Dean*, 26 Ga. 533 (1859). See *Graves v. Sheldon*, 2 D. Chip. 71 (Vt. 1824).

The Pennsylvania Supreme Court has trenched upon somewhat doubtful ground, having enunciated the doctrine that if a testator, after making his will, sell so great a part of the real estate devised as to render it impossible to give effect to the dispositions of his will, it amounts to a revocation of the will. The testator, seized of Whiteacre and Blackacre, directed his executors to sell the former for the payment of his debts, and certain legacies, and gave the residue of his property of all kinds, after the payment of said legacies, to certain other legatees. Afterwards he sold Whiteacre, and received the purchase money, and, dying, his personal property barely sufficed to pay his debts, leaving nothing for the legacies first named. *Held*, under the circumstances, the testator intended by the sale of Whiteacre to revoke his will as to everything but the appointment of executors. *In re Cooper's Estate*, 4 Barr. 88 (1846).

In a later case the court said, "There seems to be no reasonable doubt that in this State, under the Act of 1833, implied revocations by operation of law, in cases of alienation by deed, still exist. The rule is, that the revocation is, according to the common phrase, *pro tanto*. The question is to what extent these words are to be carried. The spirit and reason of the rule seems to embrace all that part of the will, the execution of which is either totally destroyed and prevented by the alienation, or is *so far mutilated and impaired as to remove from the remnant the trace or impress of the testator's intent*. It is revoked because it no longer is the will or intent of the testator. There have been cases, and will be again, where it is impossible to define with mathematical precision the exact line where the intention to revoke ceases. These must be left to the judgment of the courts." The principle of *In re Cooper* was affirmed, but held not to apply in this case: COULTER, J., in *Marshall v. Marshall*, 11 Pa. 430 (1849).

These cases virtually add to the statutory modes of revocation; another, *i. e.*, by so large an ademption as to indicate a change of the testator's intention.

The body of the modern English law on the subject under

consideration dates back no further than 1838, and may, therefore, be regarded as beyond the present purpose; while, in America, the matter is so largely regulated by enactment in the various States as to render the older English cases of relatively small importance in a general discussion.

Yet, there are some States in which no statutory regulations have been made; the acts in existence are not always all-comprehensive, and in many instances a knowledge of the common law doctrines is essential to an understanding of the very statutes themselves. Therefore, a brief review of the English law, prior to the statute of 1 Victoria, seems to be necessary.

At the basis of all the decisions lies the fundamental doctrine of the common law that a will was an appointment of real estate, and operated only upon such real estate as the testator had at the time of making it. (See *Spong v. Spong*, 1 Y. and J. 300; *Hov v. Dartmouth*, 7 Ves. 147; *Arthur v. Arthur*, 10 Barb. 9). Accompanying these rules were the corollaries: first, that any real estate acquired subsequently to the date of the will could not pass thereunder without a republication; and, second, that if, subsequently to the date of the will, the testator aliened real estate devised therein, or the form of his interest in such real estate became materially altered, this would be construed as a revocation of the devise.

Thus far, although there is room for difference of opinion as to the wisdom of the theory, there is nothing in it which is obviously unjust or repugnant to common sense. Yet, from this apparently innocent starting-point, the courts proceeded, by gradual stages, each step seeming the inevitable consequence of its predecessor, until a position of injustice, and even of absurdity, was reached, from which there was no rescue but by the intervention of the Legislature.

Losing sight of the original rule that, in order for an alteration in the estate to effect a revocation of the devise, it must be a material alteration, it was held that, a devise could not take effect unless the interest of the testator as devised remained identically the same from the date of the will down to the testator's death: See Lord Hardwicke in *Sparrow v. Hardcastle*,

3 Atk. 798. From this rule the conclusion seemed irresistible that if a testator aliened real estate previously devised in his will, the devise was thereby revoked, and that, even though he subsequently had the land reconveyed to him, for, looking at it technically, there was an "alteration" or "new modelling" of the estate.

And it was even more evident that this land reconveyed to the testator was, legally speaking, an estate newly acquired subsequent to the making of the will, and could not pass under it.

So far, the only obvious falsity was the confusion between material and immaterial alterations in the estate; but that was enough. For when the doctrine was pushed to its limits, the result was a high degree of artificiality, and, in many instances, the defeat of the testator's intention.

In the great case of *Cave v. Holford* (3 Vcs. 650), in 1798, where the matter was thoroughly investigated and the rule declared to be firmly established, Mr. Justice Rooke, in delivering the opinion of the majority, remarked: "It is often contrary to the intention of the testator that the will should be annulled; it often bears hard upon individuals to enforce the rule strictly; but the rule is so; and if it produces more mischief than good, the Legislature in its wisdom may alter it; but we are bound as judges to declare and abide by it." And Chief Justice Eyre, though he considered himself bound to recognize the authorities, dissented vigorously from the extension of the rule to any new set of facts, saying that "the doctrine of revocation has been carried to a very inconvenient extent, in consequence of which many wills have been cruelly disappointed, and many families greatly distressed."

And, in a later case, Vice-Chancellor Wood characterized the former state of the law as "that law by which, with a species of remorseless logic, any person who had once made a will, and afterwards disposed of his interest for any purposes whatever, even although he might get back the identical estate which he parted with, was held to have revoked his will. This mode of entirely defeating a testator's intention by the magic of a conveyance is a logical application of the doc-

trine that a will is an appointment of real estate. Being an actual appointment of a specific thing, and that specific thing being otherwise dealt with, although immediately taken back again into the same hand which dealt it out, it was considered to have been destroyed and gone:" *Grant v. Bridges*, L. R. 3 Eq. 347 (1866).

Bad, indeed, must have been the state of the law to have elicited such censure; and bad, indeed, it was. On one side, the doctrine of effectuating the testator's intention was pushed so far that an instrument incapable of taking effect as a conveyance of real estate was, nevertheless, construed to be a revocation of the will, in spite of the Statute of Frauds: *Montague v. Jeffries*, 7 Ves. 370; *Doe v. Llandaff*, 2 Bos. and P. N. R. 491; *Ex parte Earl of Ilchester*, 7 Ves. 348; *Shroove v. Pinke*, 5 T. R. 124, 310; *Simpson v. Walker*, 5 Sim. 1.

That such cases as these should have been linked with cases of ademption, as by ROOKE, J., in *Cave v. Holford*, 7 T. R. 399 (*et infra*), and by Lord Hardwicke in *Sparrow v. Hardcastle*, 3 Atk. 798 (*et infra*), marks the confusion which had crept into the law. In reality, revocation is always dependent upon the testator's intention, either expressed, or necessarily inferred from his actions, as in the case of a subsequent marriage and the birth of issue. Ademption, on the other hand, is entirely independent of intention, and amounts simply to this, that a man's will cannot pass what he no longer has, or, under the artificial rulings, what he no longer has in precisely the same form in which he devised it. The two doctrines have nothing in common. Suppose a man devised, aliened, and took back the same estate; he might *intend* that the devise should stand unrevoked, but under the old law it was void because a will could not pass subsequently acquired property. And the injustice of this conclusion arose from the artificiality of this rule of law, and not from the fact that the court disregarded the desires of the testator.

The devise was void because the property had been alienated, no matter what was the purpose of the testator in so alienating.

Any, the slightest, alteration in the form of the testator's interest in the devised property, was held to work, what was inaccurately called a revocation of the devise, or what was really an ademption. The estate was, legally speaking, altered, or had lost its identity. Therefore, it could not pass by the devise.

Thus, a devise was held revoked by a recovery to the uses of the deviser, because the estate was altered, though the deviser took back the old use: *Dister v. Dister*, 3 Lev. 108; *Dailey v. Dailey*, 3 Wils. 6; *Arthur v. Bockenhams*, Fitz. 240; *Marwood v. Turner*, 3 P. Wms. 163.

Where a man made a marriage settlement on a person whom he never married or asked to marry him, this was determined to be a revocation of a prior will, although the conveyance was for a special purpose, which failed, and he was in of the old use: *Lord Lincoln v. Rolls*, Eq. Cas. Abr. 409.

Lord Mansfield, in *Doe v. Potts*, 1 Doug. 709, observed: "All revocations which are not agreeable to the intention of the testator are founded upon artificial and absurd reasoning. The absurdity of Lord Lincoln's case is shocking. However, it is now law." This remark, though deserved, will be seen to be directed rather at the effect than at the cause. The root of the evil was not the disregard of the testator's intention, but the carrying to the point of absurdity, the rule that an alteration in devised property would render the devise void. And the result of this artificiality was to defeat intentions.

In *Sparrow v. Hardecastle*, 3 Atk. 798, Lord Hardwicke said: "If a man make a will devising land, and after execute a feoffment to his own use, it is a revocation of the will, notwithstanding it is in point of law the old use. So, likewise, a feoffment without livery, a bargain and sale not enrolled, or any other imperfect conveyance will be a revocation, because the estate is gone, and the will has lost the subject of its operation."

In the leading case of *Cave v. Holford* (7 T. R. 399; 3 Ves. 650), it was settled that where a testator, after the will, conveyed the estate to trustees, in trust for himself in fee till marriage, and for default of issue, to the use of himself in fee, and then married and died without issue, the conveyance was

held a revocation of a devise in fee to take effect only in case he had no issue. The conveyance, in this case, it will be observed, "so far from being inconsistent with the will, respects nothing but what is expressly reserved out of the will." Rooke, J., said: "There is a revocation which does not depend upon the intention of the testator; as where he takes back the very same estate. The consequence of law is, that the will is revoked, whether he intended to revoke it or not. There are other cases where, intending to revoke, a man has made use of a mode of conveyance, which is never completed. As where a man grants a reversion upon an estate for life which he has devised, and the tenant never attorns. So in the case of a bargain and sale without enrollment. But the revocation applicable to this case is, where the testator alters his legal interest without any intention to revoke the will. As to that, if the whole fee is conveyed, it annuls entirely the effect of the will, unless the testator republishes it." See also *Goodtitle v. Orway*, 7 T. R. 399 (1797).

In short the doctrine of these cases was "that by a conveyance of the estate devised the will was revoked, because the estate was altered, though the testator took back the same estate, and by the same instrument or by a declaration of uses, and though he did not intend to revoke. It was revoked upon technical grounds, because the estate had been altered:" *Walton v. Walton*, 7 Johns. Ch. 273.

A parting with anything less than the testator's entire interest would work a revocation of the devise *pro tanto* only.

Thus, if a devise was made, and subsequently the testator leased the land for any term less than the whole estate devised, there was a revocation only *pro tanto*; the land passed to the devisee, subject to the term, and to the devisee the rent would be paid: *Gardner v. Sheldon*, Vaughan, 259; *Lamb v. Parker*, 2 Vern. 495; *Coke v. Bullock*, Cro. Jac. 49.

A devise was held revoked by an exchange of the land, although after the testator's death it was discovered that title had never been perfected in the other party to the exchange, and the land was, in consequence, restored to the heir: *Attorney-General v. Vigors*, 8 Ves. 256.

It was uniformly held that a valid agreement to sell and convey lands revoked a previous devise as well as an actual conveyance: *Cotter v. Layer*, 2 P. Wms. 623; *Rider v. Wager*, Ibid. 332; *Mayer v. Gowland*, Dick. 563; *Knollys v. Alcock*, 5 Ves. 648; *Vawser v. Jeffrey*, 16 Ves. 519.

There were certain exceptions to the rigor of the common law rule. In *Cave v. Holford*, Rooke, J., said: "Parceners and tenants in common, being seized only of an undivided portion in the whole, would retain the same estate and interest after partition; and if it is done by deed and fine, instead of by writ, the court has so far indulged them as to say the prior devise is not revoked:" *Risley v. Baltinglass*, Sir T. Raym. 240; *Knollys v. Alcock*, 5 Ves. 648, 655.

In certain instances equity intervened, as where, having the complete legal and beneficial estate at the date of the will, the testator divested himself of the legal estate, but remained owner of the equitable interest, as in the case of a mortgage or a conveyance for payment of debts, by which a devise was not revoked in equity, though after the debts were paid the deviser took a conveyance to him and his heirs: *Harwood v. Oglander*, 6 Ves. 199 (1801).

A mortgage in fee after a devise was held a revocation *pro tanto* only, or *quo ad* the special purpose: *Tucker v. Thurstan*, 17 Ves. 161 (1810); *Brydges v. Duchess of Chandos*, 2 Ves. Jr. 417; *Perkins v. Walker*, 1 Vern. 97; *Hall v. Dench*, 1 Vern. 329; *Temple v. Chandos*, 3 Ves. 685; *Cave v. Holford*, 3 Ves. 650. It was held that the devisee should be admitted to the redemption, "for the intent of the mortgagor, making the mortgage, could be no other than only to serve his special purpose of borrowing money to supply his present occasions:" *Hall v. Dench* (*supra*).

The statute of 1 Vict. Cap. 26, § 19, *et seq.*, enacts that no wills made on or after January 1, 1838, "shall be revoked by any presumption of an intention on the ground of an alteration in circumstances;" and that no conveyance of real estate made after the execution of a will, or other act in relation to such estate, shall prevent the operation of the will upon such portion of the estate as the testator may have power to dis-

pose of at his death. Thus, after two and a half centuries, the *quære* of Brooke, in his *Abridgment* (tit. Devise, pl. 8), where he suggests that "an alienation and taking back ought not to defeat a will made before, because it is no will till death," became the established law of England. (See opinion of Rooke, J., in *Cave v. Holford*.)

Turning to the American cases, we find that they may be divided into two general classes: (1) Decisions based upon State statutes, and (2) Decisions made in States prior to the passage of any statutes, or in States where, down to the present time, no statute has been enacted.

This second class, is based, in the main, directly upon the English common law doctrines, and presents some interesting developments and deductions therefrom.

Any detailed catalogue of the various State enactments would be misplaced here.

It is sufficient to say that, in the main, where such statutes exist they are substantially similar to the English statute, and provide that "no conveyance or alteration of estate which does not wholly divest the testator of all interest in the property mentioned in the will, shall prevent the operation of the instrument with respect to that which the testator may have power to dispose of at the time of his death:" *Beach on Wills*, § 67.

Such statutes are in force in California, Dakota, Indiana, Kansas, Kentucky, Maryland, New York, North Carolina, Ohio, Virginia, Pennsylvania, South Carolina and some other States: *Stinson's Amer. St. Law* (Jan. 1, 1886), § 2810; Code Maryland, Art. 93, § 309; Penna., Act Apr. 8, 1833, § 10; South Carolina, Act 1858, 12 Stat. 700; New York, 2 R. S. 57, § 5-64, § 42-48.

In Alabama and Indiana the statutes provide expressly that the conveyance of previously devised property and taking back a new estate therein, will not effect a revocation unless the will or conveyance show an intention on the testator's part so to do: Ala. Code, § 2289; Ind. Rev. Stat., § 2565. So, in Louisiana, where it is clearly proved that the testator did not intend to revoke: *Blakemore's Succession*, 9 So. 496.

But, under the statutes of most of the above mentioned States, where, in such a conveyance, the intention to revoke is expressed, or where the provisions of the conveyance are totally inconsistent with the devise, a revocation will be implied: *Reach on Wills*, § 67; *Stinson's Amer. Stat. L.* § 2810 A.

Such statutes as these, introducing the element of *intention*, really do nothing more or less than constitute a new method of revoking a will, or part thereof.

In Kentucky, by statute, where the devisee is also the heir of the testator, the mere sale of land devised will not raise a presumption of revocation. It must be shown that the testator so intended: Gen. Stat. Ky., Art. 3, § 1; *Hazewood v. Webster*, 82 Ky. 409 (1884).

In Alabama, it is provided by statute, that a subsequent sale and conveyance of the lands devised does not operate a revocation of the devise when any part of the purchase money remains unpaid at the death of the testator, unless the intention that it shall so operate clearly appears by some instrument in writing: Code, § 2287; *Slaughter v. Stevens*, 81 Ala. 418 (1886).

The question is also affected by another set of statutory considerations.

In all the States "Wills Acts" are in force, in which are enumerated the various legal methods by which the will may be revoked. In some instances, revocations by implication are saved by express provision (*e.g.*, Mass. Stats. 1882, p. 748, § 8; N. Hamp. Gen. Laws, Cap. 193, § 14); in others, no reference is made to such cases, and the statutes declare that no will or part thereof can be revoked save in some one of the ways named in an almost literal transcript of the statute of 29 Car. II.

Consequently, we find numerous decisions, where certain dealings with previously devised property, by the testator, are held not to constitute revocations of the devise, because no such method of revocation is contemplated by the local statute: *Woolery v. Woolery*, 48 Md. 523; *Prater v. Whittle*, 16 S. Car. 40; *Spoonevorne v. Cables*, 66 Mo. 579. When we reflect

that the term *revocation* is a misnomer in such cases, these decisions, though correct in their conclusions, seem a trifle flimsy in their reasoning.

Of course, no court has gone to the length of holding that when a testator has sold and conveyed property, and has no interest in it at his death, the will is not thereby "revoked" so far as that property is concerned, even though no such method of "revocation" be contemplated by the statute. But the courts have been driven to far-fetched reasoning in their desire to render common-sense decisions, and not a little confusion has arisen, through the persistent and unreflecting employment of the term *revocation*. See *Adams v. Winn*, 7 Paige, 97 (N. Y.); *In re Dowd's Estate*, 58 How. Pr. 107 (N. Y.). In *Cessens v. Jamison*, 12 Mo. Ap. 452—the court, referring to the local statute, said: "The Legislature, in speaking of a revocation, must have intended to use the word in the sense in which it was used in the English statute, and did not mean to include the case of ademption, by parting during the lifetime of the testator, with the land devised, nor to change the rule applicable to a devise of lands, that, where the testator sells the land devised, that provision of his will becomes at once inoperative."

Aside from statute, the English common law rules have generally been adopted in America. The leading case is *Walton v. Walton*, 7 Johns. Ch. 258 (1823), where it was held that a devise of land, once revoked, expressly or by implication, cannot be restored without a republication of the will. If a testator conveys the estate devised, though he takes it back again by the same instrument, or otherwise, it is a revocation at law and in equity, even though he did not intend to revoke his will.

This may, perhaps, be regarded as authoritative in such States as have not statutory provisions regulating the matter. See *Brown v. Brown*, 16 Barb. 569 (1852).

Where a testator sells devised property, and then makes a contract with the purchaser for the reconveyance of the property, and dies before this contract is performed, he is considered of no interest which can pass by his will.

capable of operating upon subsequently acquired property: *Lanning v. Cole*, 2 Halst. Ch. 102 (1847).

Contracts to Sell and Convey.

At a very early date it was decided, in New Jersey, that whatever might be the rule in equity, an agreement by a testator, after the execution of his will, to sell lands therein devised, was not a revocation at law, the court saying: "An intention to sell does not revoke a will by which the property is devised." *Hall v. Bray*, Coxe, 212 (1794).

But, in New York, in the leading case of *Walton v. Walton*, 7 Johns. Ch. 258, it was held that, in equity, such a contract was a revocation of the devise; and this even though the contract had been rescinded by the mutual consent of the parties, so that the testator was restored to his former estate and died seized thereof. In a later case it was said, more accurately, that the will remained in force as to the legal estate, which passed to the devisee, who became a trustee for the purchaser and would be compelled to convey: *Gaines v. Winthrop*, 2 Edw. Ch. 571 (1835).

These principles are reaffirmed in the case of *Donahoo v. Lea*, 1 Swan. 119 (Tenn. 1851), which may be taken as expressing the American law in all States where the matter is not regulated by statute.

And in many of the States, including Arkansas, California, Kansas, Missouri, Nevada, New York, Ohio, Oregon, Washington, and some others, the statutes expressly provide that "an agreement to convey property previously devised does not revoke the gift, but that the property shall pass to the devisees, subject to such remedies for enforcement of specific performance as might have been law against the heirs or next of kin:" *Beach on Wills*, § 57; *Stinson's Am. Stat. L.*, § 2810.

Partition.

The English doctrine as to partitions has been followed in America. In *Duffel's Lessee v. Burton*, 4 Harr. 290 (Del. 1843), it was held that a will of lands held in common, is not revoked by proceedings for partition under which the testator accepts and becomes seized of the whole in severalty. But

such devise does not pass the after-acquired portion of the lands, even though it be expressed to be of "my part" of the lands: *Scaife v. Thompson*, 15 S. Car. 337 (1880).

In *Duffel v. Burton*, the court examined into the subject, saying: "The case of partition seems to be an excepted case, even where, to effect the partition a conveyance is necessary. . . . The reason of this seems to be that the object of the conveyance is really not to pass title, but to effect a severance of the manner of holding, and the estate to which the will applies being liable to this change without enlargement or restriction, the will is reasonably to be regarded as applying to it in its severed form of holding as well as when it was held in common."

Mortgage of Devised Land.

In *McTaggart v. Thompson*, 14 Pa. 149, it was held that mortgages are only a revocation in equity, *pro tanto* or *quo ad* their special purpose. Though in form purporting to be conveyances of the estate, yet in equity always, and now at law, they are regarded but as securities for debts. They are not to be viewed as alterations or changes of the estate, but are merely revocations *pro tanto*, or adempments, rather than revocations of the will.

Any interest or right of redemption, or other right remaining in the testator at his death would fall within the operation of the devise: *Stubbs v. Houston*, 33 Ala. 555. The fact that the mortgage was made to the deviser, even under the belief that the will was invalid, and with the intention that it should be substituted for the will, would make no difference: *McTaggart v. Thompson*; *Stubbs v. Houston*.

Sale of Devised Land with Purchase Money-Mortgage.

If a testator sells land previously devised, and takes back a mortgage for all or part of the purchase money, the devise is nevertheless adcieined. The mortgage will pass under the residuary clause. The mortgage passes no title, but simply creates a lien upon the property for security of a part of the purchase money: *Adams v. Winne*, 7 Paige, 97; *Beck v. McGillis*, 9 Barb. 35; *Brown v. Brown*, 16 Barb. 569.

McNaughton v. McNaughton, 34 N. Y. 201; *Emery v. Union Society*, 79 Me. 334 (1887).

Conversion of Real Estate into Personalty.

Of course, whenever real estate devised, is sold, this amounts to an ademption; the devisee has no claim to the proceeds: *Beck v. McGillis*, 9 Barb. 35; *Vandemark v. Vandemark*, 26 Barb. 416.

A change from personalty into real estate will revoke a bequest, as where a testator forecloses a mortgage disposed of by his will, and buys in the land: *Ballard v. Carter*, 5 Pick. 112 (1827); *Bingham v. Winchester*, 1 Metc. 390 (1840).

Sale in Fee Reserving Rent.

A grant in fee of previously devised property, renders the devise inoperative, although a rent be reserved, with a clause of re-entry: *Herrington v. Budd*, 5 Denio, 321.

So, in Pennsylvania, where, upon such a grant, a ground rent in fee was reserved, it was held that the conveyance was an entire transfer and disposal of the estate, and a substitution of an incorporeal hereditament issuing out of the ground, which preserved to the grantor no residuary estate in the land, so that there was nothing left for the devise to operate upon: *Skerrett v. Burd*, 1 Whart. 246.

Conveyances in Trust for Special Purposes.

In general, a conveyance to trustees for some particular purpose, such as the payment of debts, and then to reconvey to the grantor, or his heirs, resembles a mortgage, in that it is held to render void a previous devise of the lands, only *quo ad* the special purpose: *Livingston v. Livingston*, 3 Johns. Ch. 148; *Jones v. Hartley*, 2 Whart. 103; *Hughes v. Hughes*, 2 Munf. 209. So, where the deed of trust was to the executors, the residue to go to the devisee, it was held to be only an ademption *pro tanto*: *Minusc v. Cox*, 5 Johns. Ch. 441.

Of course, if the purpose of the trust exhausts the entire estate, the devise is deprived of all effect, just as by an absolute conveyance: *Clingan v. Michtree*, 31 Pa. 25; *Collup v. Smith*, 15 S. E. 584 (Va.).

Inoperative Conveyances.

In the old case of *Walton v. Walton*, 7 Johns. Ch. 269, it was held that a conveyance totally inoperative for want of completion or incapacity of the grantee, may amount to a revocation if it shows the intention of the testator to revoke his will.

As remarked above, this theory has no connection with the doctrine of ademption. There is not a defeat of the devise because of subsequent dealing with the devised property. There is simply an additional method of revoking a will besides those specified in the statute.

And this appears clearly in a recent case, where it is held that a conveyance executed by one who is mentally incapacitated, or unduly influenced, is ineffectual as a revocation, since there must be *animus revocandi*: *Graham v. Burch*, 47 Minn. 171 (1891).

In Louisiana there is an express statutory provision that a subsequent conveyance will operate a revocation, although the sale or donation be null and void, and the thing has returned to the possession of the testator: La. Civ. Code, § 1696.

Conveyance to the Devisee.

A conveyance of land is a revocation of the devise, even though the devisee and grantee are the same person, for he will take by the deed and not by the will: *Arthur v. Arthur*, 10 Barb. 9; *Rose v. Rose*, 7 Barb. 174; *Marshall v. Rench*, 3 Del. Ch. 239. This has been held to be so, even though the deed was cancelled in the lifetime of the testator: *Kean's Will*, 9 Dana, 25 (Ky.). See *contra*, *Wooley v. Wooley*, 48 Ind. 523.

But conveyance to a devisee, of other lands than those devised has never been held to be an implied revocation of the devise: *Marshall v. Rench* (*supra*); *Arthur v. Arthur* (*supra*).

Increase in Value of Property.

The great increase in the value of devised property by the erection of buildings thereon, is not a revocation of the devise, although the devise was made in satisfaction of a debt: *Havens v. Havens*, 1 Sand. Ch. 324 (N. Y.). See also *Wogen v. Small*, 11 S. & R. 141. SAMUEL DREHER MATLACK.

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GERDES V. CHRISTOPHER AND SIMPSON ARCHITECTURAL IRON
AND FOUNDRY CO. ET AL.¹

STATEMENT OF THE CASE.

Plaintiff recovered judgment for \$5000 against the said company and the city of St. Louis for injuries received on account of alleged negligence of defendants in obstructing the street in the city of St. Louis, by depositing thereon a lot of iron pillars by said company with which his wagon collided, in consequence whereof he lost his leg. The petition charged negligence of said company in placing the iron on the street, and of the defendant city of St. Louis in permitting it to remain thereon. The answer was a general denial and a plea of contributory negligence.

DECISION.

The Supreme Court, MacFarlane, J., delivering the opinion said: There can be no doubt that the manufacturing company had the right to make reasonable use of these streets for the deposit of their manufactured goods, for the purpose of loading and unloading them, though not directly authorized by an ordinance of the city. But it had no right to make a permanent use of the streets for storing its property, or to make such temporary use as would unreasonably interfere with travel. The reasonableness of the use should be measured by the character of the articles to be handled. It

¹ Reported in 27 S. W. Rep. 615.

appeared from the evidence that some of the iron pillars, which is the obstruction in question, had been on the streets for a number of days, and it was a proper question for the jury to say whether they were allowed to remain an unreasonable length of time. We think that defendants could fairly have been charged with negligence under the evidence.

OBSTRUCTION TO HIGHWAYS FOR BUSINESS PURPOSES.

The question passed upon in the above case is of no little interest and importance. It arose by reason of the duty of "municipal corporations to keep their streets and highways in a proper state of repair, and free from obstructions, so that they will be reasonably safe for travel; and if, having notice of such defects or obstructions, they neglect to repair or remove them, they will be liable for all injuries: provided that he who received the injury was himself at the time, in the exercise of due care."

To this strict rule, there is a well-recognized qualification, which is declared by Judge Dillon in this language: "But it is not every obstruction, irrespective of its character or purpose, that is illegal, even though not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction of the right of public travel. Temporary obstructions of this kind are not invasions of the public easement, but simply incident to or limitations of it. They can be justified when, and only so long as they are reasonable and necessary. There need be no absolute necessity. It suffices that the necessity be a reasonable one:" *Dillon Munic. Corp.*, § 730.

At the common law, the obstruction of the highway by the use of it for business purposes, for a long and unreasonable time, was indictable as a nuisance. The earliest case, probably, that decided this was that of *The King v. Russell*, 6 East. 427. The defendant was charged with permitting his wagons

to stand in the street before his warehouse for several hours at a time both day and night, whereby the king's subjects were, during that time, much impeded and obstructed. The court said that the defendant could not legally carry on any part of his business in the public street, to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance; that if the nature of the defendant's business were such as to require the loading and unloading of so many more wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot: See also *Rex v. Jones*, 3 Campbell, 230 (1812).

A reasonable necessity justifies the use of the street for a reasonable time. In 1814, ten years after the above case was decided, the question as to what use of the public streets is indictable as a nuisance, arose in Pennsylvania in the case of *Commonwealth v. Passmore*, 1 S. & R. 217. Tilghman, C. J., said: It is true that necessity justifies actions which would otherwise be nuisances. It is true also that this necessity need not be absolute, it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street, because it saves the expense of storage. But I see no more necessity in his case than that of a private merchant. It is equally in the power of the auctioneer and the merchant to

procure warehouses and places of deposit in proportion to the extent of their business.

The consideration that the property or persons causing the obstruction is not under the direct control of the defendant or that the business is a lawful one, does not excuse him. So in *Rex v. Carlile*, 6 Carr & Payne, 636, Baron Park said: "If a party, having a house in the street, exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass as they ought to do, this is an indictable nuisance. This decision was followed by the Supreme Court of New York in the case of *The People v. Cunningham*, 1 Denio, 524 (1845). The defendants owned a brewery, from which extended a pipe about two feet over the curbstone, through which the swill was emptied into the carts and wagons of their customers. The number of teams collected there was so great that the street was frequently blocked from morning to night, so that others were prevented from passing. The court held it to be a nuisance and said: "The fact that the defendants's business was a lawful one does not afford them a justification in annoying the public in transacting it. The defendants take possession of one side of a public street from which to supply their customers with an article furnished from their distillery. By that act they invite those who deal with them to come to that place to receive it with such vehicles as they used; and the effect is to obstruct the street in the manner complained of. This effect was, it seems to me, the probable consequence of the defendants's acts. They furnished the occasion and gave out the invitation, and no obstruction of this kind would have taken place or would be likely to take place in that street, if the occasion of the assembling of such persons for the object mentioned was removed.

Building materials placed before a building in course of erection is a legitimate use of the highway; provided a free and easy passage for all business and travelling purposes is left.

In *Palmer v. Silverthorn*, 32 Pa. 65, the plaintiff that defendant was answerable for the loss of his or had its leg broken in running over the building :

that defendant had placed in the highway. The court affirmed the plaintiff's second point, which was a prayer for instruction that, if the injury was occasioned by obstructions placed in the highway by the defendant, he would be liable, with the qualification that if the defendant was at the time putting up a building, and in doing so he used a reasonable part of the highway, but no more than was conveniently necessary to enable him to complete the erection, and there was ample and sufficient room left for the passage of cattle and persons travelling, it would be otherwise. The necessity of the case was probably the foundation of the rule, and is the foundation of most laws and municipal investigations. In Philadelphia the occupation of a street by building materials is regulated by an ordinance passed May 3, 1855, § 1, 144: "When any person or persons shall be about to erect or repair any house or building within the city of Philadelphia, and shall be desirous to occupy a part of the public street or road for placing building materials thereon, he or they shall make application to the license clerk, stating the number and extent of such building, etc., and thereupon the license clerk shall issue a written or printed permit to occupy such part of any public street, etc., not exceeding in extent the dimensions of the front of the premises about to be built upon or repaired, and eighty feet in addition thereto, and not exceeding nine feet in breadth, for any time, not exceeding four months, as shall be deemed necessary and reasonable. *Provided*, That a sufficient passage or cartway shall at all times be left unencumbered between said building materials and the opposite curbstone for the passage of vehicles. And, *provided, further*, That no building materials be placed within four feet of any fire-plug, pump, or flagstone crossing, or within twelve inches of any curbstone." Section 2 of the above ordinance provides that the permit allows the use of the highway only for the materials to be used in the said building. Section 3 provides for the erection of a wooden platform to extend along the front of the building. Similar ordinances exist in most of our large cities.

In Massachusetts, the placing or maintaining stones or

other obstructions in a public highway, without lawful authority, is a nuisance at common law and indictable as such: *Commonwealth v. Blaisdell*, 107 Mass. 234; *Commonwealth v. King*, 13 Met. 115.

In the recent case of *Loberg v. Amherst* (Wis.), 58 N. W. 1048, it was decided that the deposit of mortar boxes, necessarily in use in plastering a house, upon a public highway, by one having the rights of an abutting owner, is not an unlawful use of the highway where it is not unreasonably prolonged, although they might have been placed in the owner's yard.

In the two cases of *Mallory v. Griffey*, 85 Pa. 275, and *Pielott v. Simmons*, we see how injuries result by horses taking fright at obstructions in the highway. In such instances the negligence of the plaintiff in contributing to the injury is a matter of defence, and ordinarily the burthen of proving it is on the defendant.

The doctrine laid down in the earlier cases that the obstruction of the highway, to be lawful, must result from a necessary and reasonable use thereof, was somewhat extended in the case of *City of Allegheny v. Zimmerman*, 95 Pa. 293. Prior to the election of 1876, a Liberty Pole was erected in the street, and a piece of it subsequently fell upon, and injured the plaintiff. Justice Mercur said, in delivering the opinion: Any unreasonable obstruction of a highway is a public nuisance, for which an indictment will lie. It is not, however, every obstruction in a highway that constitutes a nuisance *per se*. When it is not, and whether a particular use, is an unreasonable use and a nuisance, is a question of fact to be submitted to a jury. . . . But the right to partially obstruct a street does not appear to be limited to a case of strict necessity; it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with public travel. Thus public hacks, by authority of the municipality, may stand in particular parts of the streets awaiting passengers, although the public are thereby excluded from using that part of the street most of the time. So shade trees may stand between the sidewalk and the central part of the street without constituting a nuisance *per se*. They may become a nuisance by

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disease or decay, yet the mere partial obstruction of a part of the street, when in fact such obstruction does not interfere with the public use, does not create a nuisance. It does not work that hurt, inconvenience, or damage to the public, necessary to constitute the offence: See also *Walter v. McCormick*, 52 N. J. L. 470.

From recent decisions it would seem that the obstruction, to be a nuisance, must be continuous. In *Davis v. Curry*, 154 Pa. 598, it was left for the jury to determine whether the constant repetition of the act of placing machinery and castings upon the sidewalk was such as to amount to substantial continuity of obstruction as distinguished from the lawful, temporary use of the sidewalk: *Commonwealth v. Finley*, 15 Ky. L. Rep. 60.

The right of property owners to leave objects on or along a highway, in front of their premises, temporarily and for special purposes, is of equal grade, before the law, with the right of travellers to journey on the highway. Moreover it is an absolute right and may be exercised in derogation of the right of the travelling public: *Piolett v. Summers*, 106 Pa. 95.

What is a reasonable manner must always depend upon the circumstances. In *Valle v. U. S. Express Co.*, 147 Pa. 404 (1892), the court said: "It might and doubtless would be unsafe to leave such an obstruction (a small dark green safe) as was described in this case, unguarded for a single moment upon a sidewalk near a railway station, thronged by people rushing to and from trains, while no inconvenience might be apprehended from leaving the same obstruction several hours upon a less frequented street. Hence, it is impossible to lay down any precise rule as to the length of time a person may allow his property to remain upon a highway without incurring the charge of negligence."

In the later case of *Davis v. Curry*, *supra*, it was said: Manufacturers, merchants, traders and carriers have their warehouses, stores and factories on the streets of cities and towns. It is to the interest of the public that these should be carried on in cities and towns; to successfully do this, necessarily the sidewalks and streets will be temporarily

obstructed with bales and boxes of goods and the products of the factory; they must ship and must move them; they cannot reach the dray, wagon or cart without moving them across the sidewalk.

In so far as this is a temporary and necessary obstruction of the walk, and an inconvenience to the public passing over it, the public in the common interest of trade and commerce must submit to it. But while this is the case, it must not be forgotten by municipal authorities that the sidewalks and streets are primarily for the use of the passing public. The merchants or manufacturer's right to the temporary, necessary use of them is permissive only, and subordinate to that of the public. See, also, *Hindman v. Timme* (Ind.), 35 N. E. Rep. 1046; *Illinois C. Ry. Co. v. State* (Miss.), 14 So. Rep. 459; *Taylor v. Bay City St. Ry. Co.* (Mich.), 59 N. W. Rep. 447.

As to obstructions suspended in the air by hoisting them from the street, see *Fuhrmeister v. Wilson et al.*, 30 Atl. Rep. 150, decided October 1, 1894.

From a review of the cases here discussed, then, we deduce these principles:

I. The primary purpose of a street or sidewalk is for the passage and travel of the public.

II. Any obstruction of the public highway, to be lawful, must be necessary, temporary, and reasonable. To this rule, there is this qualification: The use of the street is not limited to cases of strict necessity, but it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with the public rights.

H. GRAHAM BEAKLY.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR OCTOBER.

Edited by ARDEMUS STEWART.

The Supreme Court of Ohio has recently decided that in a civil action for the recovery of money the plaintiff may, on the ground that the defendant is a non-resident of the state, have an attachment against the property of a defendant partnership, all the members of which reside out of the state, though it was formed for the purpose of carrying on business in the state, and has a usual place of doing business therein: *Byers v. Schluppe*, 38 N. E. Rep. 117.

The Court of Appeals of England has lately held that, inasmuch as the acceptor of a bill of exchange has the full three days of grace in which to pay it, when payment is refused by the acceptor at any time of the last day of grace, the holder, though at once entitled to give notice of dishonor to the drawer and indorser, has no cause of action against either the acceptor or the other parties to the bill until the expiration of that day, because the acceptor may repent before it expires; and that an action brought by the holder against the acceptor on the last day of grace must be dismissed as premature: *Kennedy v. Thomas*, [1894] 2 Q. B. 759. This seems at variance with the decision of the Supreme Court of Idaho in *Sabin v. Burke*, 37 Pac. Rep. 352, noticed in 1 AM. L. REG. & REV. (N. S.) 758.

The courts are now full of the echoes of the great railroad insurrection, and never, perhaps, has the strike question been legally reviewed in so many of its protean aspects.

Boycotts

The Circuit Court for the Southern District of California in *So. Cal. Ry. v. Rutherford*, 62 Fed. Rep. 796, had occasion, to pass upon one very interesting phase of the problem; and held that, when employes of a railroad, though staying in its service, refuse to operate trains hauling certain cars (in this case Pullmans), though the company is bound by contract to carry them, thus interrupting interstate commerce and the transmission of the mails, and subjecting the company to suits and great and irreparable damage, an injunction will issue to compel them to perform their duties while they remain in the service of the company. This is in full harmony with the case of the *Toledo A. A. & N. M. Ry. Co. v. Penna. Co.*, 54 Fed. Rep. 746; but such an interference with the putative right of every one to do as he pleases, irrespective of the legal rights of others, will assuredly rouse the ire of our congressional demagogues.

The constantly varying circumstances which affect the relations of common carriers to the public and to each other,

Carriers,

**Delivery of
Goods**

never fail to give new aspects to those relations. The Supreme Court of Tennessee has just decided a case which seems to be one of first impression: *Stewart v. Gracey*, 27 S. W. Rep. 664, in which it ruled, that the mere delivery of warehouse receipts to a common carrier, with an order for delivery of the goods, but without a bill of lading, is not a constructive delivery of the goods, so as to render the carrier liable in case the goods are burned in the warehouse before it can remove them, though it entered the receipt on its books, and has commenced to remove the goods. LEA and CALDWELL, JJ., dissented, however, and the opposite doctrine would seem to have much to recommend it. Granting that the mere delivery of the warehouse receipts to the carrier would impose no duty on it, if it remained passive, its acts in this case would seem to amount to an acceptance of the goods

for the purpose of carriage; and there cannot well be an acceptance without a previous delivery.

The Court of Civil Appeals of Texas has lately held, that a deviation from the stipulated route, in order to avoid delay,

Liability for
Deviation
from Route

because it is impossible to follow the regular route on account of floods, does not render the carrier an insurer, and therefore liable for the delay that may be caused by such deviation: *International & G. N. R. Co. v. Wentworth*, 27 S. W. Rep. 680. This doctrine is a just one, especially in view of the fact that when the carrier undertakes the shipment of perishable goods (such as live stock), and their transportation is delayed by an obstruction on the main line, such as a washout, but the railroad has a way around the obstruction, by which delay could be avoided, the company will be liable to the shipper for any damages caused by delay, if that way is not followed: *Receivers of Mo., K. & T. Ry. Co. v. Olive*, (Tex.), 23 S. W. Rep. 526. But if the carrier knows at the time of its undertaking to transport the goods that part of its route is obstructed by floods, the existence of such floods is not such an act of God as will relieve it from liability for injuries to the goods while carried on another route: *Adams Exp. Co. v. Jackson*, (Tenn.), 21 S. W. Rep. 666. It is true, however, that by a wilful deviation from an agreed route, not caused by stress of unavoidable circumstances, the carrier becomes an insurer, and cannot invoke the benefit of any exceptions in its behalf in the contract of carriage: *Robertson v. Nat'l S. S. Co., Ltd.*, 17 N. Y. Suppl. 459.

According to the Supreme Judicial Court of Maine, in *Rogers v. Kennebec Steamboat Co.*, 29 Atl. Rep. 1069, one

Limitation of
Liability

who accepts and uses a free pass, as a pure gratuity, on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition, whether he reads it or not; such a contract is not against public policy, and will exonerate the carrier from all liability for the negligence of its servants. This case was decided on the authority of *Quimby v. Boston & Me. R. R.*, 150 Mass. 365; S. C., 23 N. E. Rep. 205, and *Griswold v. N. Y. & N. E. R. R.*, 53 Conn. 371; S. C., 4 Atl. Rep. 261.

The rule is a fair one, for such a passenger is a mere licensee, to whom the company owes no duty; but it has been extended rather unwarrantably, to the case of a drover or other shipper of goods, who attends them in order to care for his property while in transit: *McCawley v. Furness Ry. Co.*, 8 L. R. Q. B. 57; *Poncher v. N. Y. Cent. R. R.*, 49 N. Y. 263. This is denied, however, by the courts of other states and by the federal courts: *Pa. R. R. v. Henderson*, 51 Pa. 315; *Cleveland, &c., R. R. v. Curran*, 19 Ohio, 1; *R. R. v. Lockwood*, 17 Wall. 357; *Ry. Co. v. Stevens*, 95 U. S. 655; with good reason, for the shipper certainly gives some consideration for his pass, by relieving the carrier, to a certain extent, of the care of his goods. The general rule also extends to the case of a street car passenger, riding on a pass: *Muldoon v. Seattle City Ry. Co.*, 7 Wash. 528; S. C., 35 Pac. Rep. 422. It does not apply, however, to the case of a government mail clerk: *Sryboldt v. N. Y., L. E. & W. R. R.*, 95 N. Y. 562; and some courts deny its validity *in toto*: *G. C. & S. F. Ry. Co. v. McGown*, 65 Tex. 640.

The Circuit Court for the Western District of North Carolina has decided, in *Porter v. Davidson*, 62 Fed. Rep. 626, that property in possession of a sheriff under process issued by a state court, cannot be taken out of his possession in an action of claim and delivery instituted in a federal court.

In the opinion of the Supreme Court of New York, a city ordinance which provides that if a dog attacks a person, a police justice may, on complaint made, order the owner to kill the dog immediately, and impose a fine for failure to obey the order, but which does not require that notice and opportunity to be heard be given the owner, is void, as depriving of property without due process of law, since dogs are property in New York: *Pro. v. Tigue*, 30 N. Y. Suppl. 368.

The Supreme Court of Oklahoma has just decided, in *Burke*

v. *Territory*, 37 Pac. Rep. 829, that the power to punish for contempt is inherent in all courts of record; that the legislature has no power, in the absence of constitutional restrictions, to limit or regulate the inherent power of the courts to punish for contempt; and that a publication made while a matter is pending in court, charging directly that the action of the court in regard to that matter is an effort to browbeat the grand jury; an effort to bend the grand jury to the will of the judge; is a contempt. This is in full accord with the general rule on the subject, that "when a publication in a newspaper, being read by jurors and attendants in courts, would have a tendency to interfere with the proper and unbiassed administration of the laws in pending cases, it may be adjudged a contempt and punished accordingly." *State v. Judge of Civil District Court*, 45 La. An. 1250; S. C., 14 So. Rep. 310. This subject is fully treated in an annotation in 32 AM. L. REG. & REV. 1046, on the case of *Pro. v. Stapleton*, 18 Colo. 568; S. C., 33 Pac. Rep. 167. See also *State v. Waugh*, (Kans.), 37 Pac. Rep. 165.

The Supreme Court of Pennsylvania has lately held that an agreement by a grandfather to pay his daughter \$20,000, and her son \$10,000 when he comes of age, if she **Contracts, Public Policy** will permit the son to live with him, and be educated by him, she to see him whenever she desires, is not void as against public policy: *Enders v. Enders*, 30 Atl. Rep. 129.

The Court of Civil Appeals of Texas has carved out an interesting exception to the general rule in regard to contracts in restraint of trade, by ruling, in *Anheuser-Busch Brewing Ass'n v. Henck*, 27 S. W. Rep. 692, **Restraint of Trade** (1) that a combination of persons and firms in a city for the control of the sale of beer and the cessation of competition *inter se*, is not void at common law as against public policy, although in restraint of trade, since beer is not an article of prime necessity, and its sale is closely restricted by public policy; and (2) that a contract by a brewing association to furnish beer to a dealer in a city in bulk, and not to furnish it in bulk "to any other party" in said city, for one year, is not

void as against public policy and in restraint of trade, so as to prevent a recovery for beer sold thereunder.

The reasoning by which the first branch of the above decision is supported, sufficiently exposes the flimsiness of the argument by which the Supreme Court of Pennsylvania sought to bolster up its decision in the case of *Nester v. Continental Brewing Co.*, 161 Pa. 473; S. C., 34 W. N. C. 387; 29 Atl. Rep. 102, if, indeed, that flimsiness is not so patent as to require no effort to point it out. It is difficult to speak seriously of a decision which compares beer to breadstuffs, and speaks of a combination to restrain its sale as being injurious to the public interests. There never was a clearer case of sticking in the bark. There is an excellent annotation on the Nester Case, by G. Herbert Jenkins, in 1 AM. L. REG. & REV. (N. S.) 639.

So far as the second branch of the decision is concerned, it rests on substantially the same grounds as the first; but is liable to be affected by a greater variety of considerations, as was the case, for instance, in *Niagara Falls Brewing Co. v. Wall*, (Mich.), 57 N. W. Rep. 99, where it was held that a retail liquor dealer, who has failed to pay a state license tax, and is actually engaged in illegal traffic, cannot recover from a brewing company for its breach of a contract to sell its beer exclusively to him in a designated town.

The Circuit Court for the District of Massachusetts has ruled, in *Littleton v. Ditson*, 62 Fed. Rep. 597, that the proviso in § 3 of the Copyright Act of March 31, 1891, that, "in the case of a book, photograph, chromo, or lithograph," the two copies required to be delivered to the Librarian of Congress shall be manufactured in this country, does not include musical compositions published in book form, or made by lithographic process.

The Supreme Court of Tennessee has lately decided that the liability of the directors of a corporation, under a charter providing that if the corporate indebtedness shall exceed the capital stock paid in, the director assenting thereto shall be individually liable for such excess

is solely for such excess of indebtedness, and to all the creditors of the corporation; and that, therefore, a portion only of the latter cannot maintain an action for their individual debts. *Moulton v. Cornell-Hall-McLester Co.*, 27 S. W. Rep. 672. Truly, a curious doctrine!

The Supreme Court of Indiana has recently passed upon a very interesting question of criminal law, in *Beasley v. State*, 38 N. E. Rep. 35, in which case it held that when a husband takes the personal property of his wife, under circumstances which would constitute larceny if he were a third person, he is guilty of that offence. This is correct beyond a doubt, in the present state of the laws relating to the property of married women; but imagine the sensations of the sages of the common law, if such a doctrine had been propounded to them. The same has been held with regard to arson: *Garrett v. State*, 109 Ind. 527; S. C., 10 N. E. Rep. 570. See, however, *Snyder v. Pro.*, 26 Mich. 106.

In the judgment of the Queen's Bench Division of England, as given in *Queen v. Silverlock*, [1894] 2 Q. B. 766, a count in an indictment for obtaining a check by false pretences, which charges that the defendant, by causing a fraudulent advertisement to be inserted in a newspaper, did falsely pretend to the subjects of her Majesty the Queen, that . . . by means of which last mentioned false pretence he obtained from A. a check, was sufficient, though it did not allege the false pretence to have been made to any particular person.

According to the Supreme Court of Alabama, detainee lies by a vendee of oxen delivered to him under an executed contract of sale, but afterwards wrongfully seized by the vendor: *Barnhill v. Howard*, 16 So. Rep. 1.

The Supreme Court of New York maintains, that a threat

by the widow of a decedent that she will take his body to a certain place for burial, unless his mother assigns a policy on decedent's life to her, is not such duress as will vitiate the assignment: *Jewelers' League of City of New York v. De Forest*, 30 N. Y. Suppl. 88.

The Supreme Judicial Court of Massachusetts has lately ruled, that when one conveys to a railroad company a right of way through his land, so as to cut off access to a part thereof, he has a right of way of necessity over the land conveyed: *N. Y. & N. E. R. Co. v. Board of R. R. Comrs.*, 38 N. E. Rep. 27; but the Supreme Judicial Court of Maine has held, that no right of way from necessity exists across the remaining land of a grantor, when the land to which such right of way is claimed is surrounded on three sides by the sea: *Kingsley v. Gouldsbrough Land Imp. Co.*, 29 Atl. Rep. 1074. The same has been held in the case of a grant of an island: *Lawton v. Rivers*, 2 McCord (S. C.), 445; *Turnbull v. Rivers*, 3 McCord (S. C.), 131.

The Supreme Court of Alabama, in *Johnson v. State*, 16 So. Rep. 99, reasserts the principle of evidence, abundantly supported by the cases cited, that when a declaration of the deceased, made when he is not in fear of immediate death, is subsequently reaffirmed by him when he believes death to be imminent, or "in the consciousness of impending dissolution," it is admissible as a dying declaration, though not re-read to him at the time of reaffirmance. The same doctrine was held in *Pio. v. Criss*, (Cal.), 36 Pac. Rep. 367. Of course, if the declaration is read over to the deceased before its reaffirmance, there is no doubt as to its admissibility: *Million v. Com.*, (Ky.), 25 S. W. Rep. 1059.

The Supreme Judicial Court of Massachusetts has recently decided, that photographs, taken three hours after the commission of a homicide, showing the condition of the premises on the discovery of the crime, and satisfactorily verified, are admissible, though the killing be admitted,

as they may naturally be expected to aid the jury in understanding the situation of affairs at the time and place of the commission of the crime: *Conn. v. Robertson*, 38 N. E. Rep. 25.

The Supreme Court of New York, following the *Rauscher Case*, 119 U. S. 407, holds that under the extradition treaty

Extradition

between the United States and Great Britain, a person extradited from England for assault with intent to murder, cannot be convicted of assault with intent to do great bodily harm. The judge who delivered the opinion (on *habeas corpus*, at special term) expressly declined to pass upon the question as to the effect of a conviction of a less crime involved in that upon the accusation of which extradition was had, on the ground that under the New York statute the latter crime was not included in the former, and that, therefore, that question did not enter into the case. He declined to discharge the prisoner, however, and remanded him to await the decision of the general term on the legality of the conviction: *Pro. v. Hannan*, 30 N. Y. Suppl. 370. It is to be hoped that that decision will be against the prisoner, in order that the questionable decision in the *Rauscher* case may have a thorough re-examination, and, if possible, a reversal. See remarks upon this case in an article entitled, "The Right to Try an Extradited Criminal for an Offence other than that Specified in the Extradition Proceedings," in 28 Am. L. Rev. 568.

Judge Morrow, of the District Court for the Northern District of California, has recently held, in the case of the Salvadorian fugitives, *In re Eseta, &c.*, 62 Fed. Rep.

Political Offences

964, that the jurisdiction of a judge, sitting as a committing magistrate in a case in which fugitives are charged with extraditable crimes, is in no way affected by, and he will not inquire into, the manner in which the persons so charged came or were brought into the United States; and in *In re Eseta, &c.*, 62 Fed. Rep. 972, that the committing magistrate has jurisdiction, and it is his duty, to determine whether the offence charged is political, and not subject to extradition; that offences committed by officers of the party in possession of

the government, during the progress of an attempted revolution, and the existence of active hostilities between the contending parties, are political, and not extraditable; and that offences within the jurisdiction of military law, which for the time being supersedes the common law, are not extraditable.

The Court of Civil Appeals of Texas has ruled in *Simmang v. Harris*, 27 S. W. Rep. 786, that a sale of land will not be rescinded on the ground of fraud merely because
 Fraud, Rescission the grantor, in the abstract of title furnished the vendee before the sale, omitted a portion of a will, which is claimed to restrict the title of the grantor to a life estate, when the will is on record, and the construction of the part omitted involves a technical knowledge of the law.

The Supreme Court of Minnesota has ranged itself on the side of those who claim that the laws forbidding the possession of game out of season apply to game killed
 Game lawfully, either in the state of sale, and kept in storage, or imported from a state having a different close season: *State v. Rodman*, 59 N. W. Rep. 1098. The cases on this subject are collected in 1 AM. L. REG. & REV. (N. S.) 751.

The Supreme Court of Alabama has very properly decided in a recent case, that when a police officer illegally arrests a
 Garnishment person, and takes possession of his money and effects, these are not subject to garnishment in the hands of such officer by a creditor of the person arrested, there being no contractual relation between the officer and such person: *Cunningham v. Bakrr*, 16 So. Rep. 68; and the Supreme Court of Georgia has ruled, that a "commercial traveller," whose business it is to travel and sell goods for his employer, though employed and paid for his services by the day, is not a "day laborer," and his wages are not therefore exempt from garnishment under Ga. Code, § 3554.

In the opinion of the Supreme Court of Iowa, when two

persons are charged in the same indictment with murder in the first degree, the conviction of one of murder in the second degree will not prevent the trial of the other for the crime as charged in the indictment: *State v. Lee*, 60 N. W. Rep. 119.

In the opinion of the Supreme Court of Missouri, as expressed in *Havens v. Germania Fire Ins. Co.*, 27 S. W. Rep. 718, the words "wholly destroyed," used in reference to a building, in either a statute or an insurance policy, must be taken to mean that the building is totally destroyed, as such, though there is not an absolute extinction of all its parts, and that a building is none the less "wholly destroyed" because part of the machinery had been removed therefrom pending repairs, and stored in another building, not exposed to the fire.

There is a very valuable article on the effect of these words, in relation to insurance, by M. C. Phillips, Esq., in 33 Cent. L. J. 319.

The Supreme Court of Alabama, following the decision of the Supreme Court of the United States in *Lascelles v. Georgia*, 148 U. S. 537; S. C., 13 Sup. Ct. Rep. 687, has lately reaffirmed the rule that a person extradited from another state of the Union may be tried on a charge other than that on which he was extradited, without first being tried on the latter, or given a chance to return to the state which surrendered him: *Carr v. State*, 16 So. Rep. 150, 155. One would have thought that the decision of the Supreme Court would have settled this question finally, especially as it was so thoroughly consonant with principle and with the weight of prior authority. But it seems to be a stock subject of exception in all cases to which it applies, something like the general exception in civil cases, "because the judge failed to charge in favor of the defendant."

The general rule has also been upheld recently in *State v. Kraly*, (Iowa), 56 N. W. Rep. 283, on the authority of *State v. Ross*, 21 Iowa, 467, a case of kidnapping; a conviction of

petit larceny has been held valid where the defendant was surrendered on a charge of grand larceny : *State v. Walker*, (Mo.), 24 S. W. Rep. 1011 ; and a similar conviction for a less crime was held legal in *Comm. v. Johnston*, (Pa.), 2 D. R. 673 ; S. C., 12 Pa. C. C. 263. It has been ruled, in Minnesota, that the mere fact of interstate rendition will not exempt the defendant from civil prosecution while detained under such proceedings, though, of course, it would be different if the rendition process were a mere contrivance to bring the defendant within the reach of civil process ; and that the principle of public policy which exempts a witness or party appearing voluntarily from the service of civil process in such cases, in order to further the ends of justice by encouraging such appearance, does not apply when the presence of the party is compulsory : *Rrid v. Ham*, 56 N. W. Rep. 35 ; S. C., 54 Minn. 305. The cases on the subject will be found collected in an article on this and kindred subjects, in 28 Am. L. Rev. 568.

Both the Supreme Court of Texas and the Court of Civil Appeals of the same state agree, that a judge is not disqualified from hearing a case, merely because his brother, who is attorney for one of the parties, has a contingent interest in the result of the suit, due to his having agreed with his client for a contingent fee : *Winston v. Masterson*, 27 S. W. Rep. 691, 768. This is a very sensible view of the matter, much more reasonable than the decision in *Howell v. Budd*, 91 Cal. 342 ; S. C., 27 Pac. Rep. 747, where it was held that the sons of a judge, who agree to try a case for a contingent fee, are parties within the meaning of the statute, sufficient to disqualify their father from trying the case.

There is no affinity between the blood relations of the husband and the blood relations of the wife ; and hence the brother of the husband may lawfully preside at the trial of the wife's brother for the commission of a crime : *Exp. Harris*, 26 Fla. 77. A judge, the brother-in-law of a stockholder of a corporation, who is also its president, is not disqualified by that relation to try a suit to which the corporation is a party :

Leavis v. Hillsboro Roller Mill Co., (Tex.), 27 S. W. Rep. 338. So, also, a guardian *ad litem* is not a party to the suit, but an officer of the court; and a surrogate is not disqualified to act on the probate of a will, because his brother has been appointed guardian *ad litem* of an infant party: *In re Van Wageningen's Will*, 69 Hun. 365; S. C., 23 N. Y. Suppl. 636.

In the opinion of the Supreme Court of Illinois, when jurors, after agreeing on a verdict, and before its return, go into a saloon, and are there treated by lawyers for both sides, such conduct is no cause for a new trial, since both parties are *in pari delicto*: *McLaughlin v. Hinds*, 38 N. E. Rep. 136. *Quære*, as to the effect if one lawyer stood more of the expense than the other, or if one, on the plea of having no money, got the other to stand the whole treat?

The Chancery Division of England has recently decided, that a covenant in a lease that the lessee will not carry on a business similar to that of another tenant of the same lessor, is not violated by maintaining a lunch counter for the sale of tea, coffee, pastry and cold meat, without a license for the sale of intoxicants, while the other tenant carried on a regular licensed restaurant, for the sale of all sorts of eatables and liquors, the former establishment being also much smaller, and the prices considerably lower: *Drew v. Gwy*, [1894] 3 Ch. 25.

The Supreme Court of New Hampshire has lately passed upon a rather unusual state of affairs, arising from a modesty one does not look for nowadays in a public official. The office of governor of that state had become vacant, and the duty of filling the vacancy devolved upon the president of the Senate, who, however, refused to accept. But the court held that he might be compelled by mandamus to perform the duties of the office: *Barnard v. Taggart*, 29 Atl. Rep. 1027. This is in line with the rule which holds that mandamus will lie to compel the acceptance of a municipal office by one who, possessing the necessary

*Mandamus,
Acceptance of
Office*

qualifications, has been duly elected thereto: *Pro. v. Williams*, (Ill.), 33 N. E. Rep. 849.

The Supreme Court of Washington holds, in conformity with the general rule, that a municipal corporation will not be
Award of Contract compelled by mandamus to award a contract to the lowest bidder for city work, even though such contracts are by law required to be let to the lowest bidder: *Times Pub. Co. v. Everett*, 37 Pac. Rep. 695. *A fortiori*, when there is no such statutory obligation, mandamus will not lie: *State v. Lincoln Co.*, 35 Neb. 346; S. C., 53 N. W. Rep. 147; *State v. Dixon Co.*, 24 Neb. 106; S. C., 37 N. W. Rep. 936.

According to the judgment of the Circuit Court of Appeals for the Fifth Circuit, in *Texas & P. Ry. Co. v. Seville*, 62 Fed. Rep. 730, the wanton and malicious use of the
Factor and Servant steam whistle of a locomotive, by servants of a railroad company, who are in charge of the locomotive, while it is in motion on a regular or authorized run, is an act within the scope of their employment, so far as to charge the company with liability for injuries caused thereby.

The Supreme Court of Errors of Connecticut, in *Gregory v. Lee*, 30 Atl. Rep. 53, has ruled, that when a minor contracts
Minors for the lease of a room, and leaves after occupying it for part of the period covered by the lease, he cannot be compelled to pay for the remaining time; because, granting that the room was a necessary, the contract therefore was still liable to be rescinded at the election of the minor, and was in fact so rescinded by his ceasing to occupy the room.

The Circuit Court of Appeals for the Eighth Circuit holds, that when a municipal body has lawful authority to issue bonds
Municipal Corporations. Mississippi or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those proceedings is certified, on the face of the bonds, by the body to which the law entrusts the power, and upon which it imposes the duty, to ascertain, determine and certify this fact, before or at the time

of issuing the bonds, such a certificate will estop the municipality, as against a *bona fide* purchaser of the bonds, from proving its falsity, in order to defeat them: *Nat. L. Ins. Co. of Montpelier v. Board of Education of City of Huron*, 62 Fed. Rep. 778.

While, as we have seen, the Supreme Court of Washington denies the right of the lowest bidder on a municipal contract to maintain mandamus to compel the award of the contract to him, it acknowledges the fact that if such bidder be a tax-payer, he may sue as such to enjoin the performance of a contract awarded to a higher bidder, though his action is prompted by other considerations than his liability to excessive taxation: *Times Pub. Co. v. Everett*, 37 Pac. Rep. 695. This decision is an extension of the doctrine asserted in *Mazet v. Pittsburg*, 137 Pa. 548; S. C., 20 Atl. Rep. 693.

The Court of Errors and Appeals of Delaware has lately held, that coasting on the streets of a town is a public nuisance, irrespective of an ordinance of the city council declaring it to be such; and that the neglect of the police to abate the nuisance will not render the town liable to one injured by a person coasting, while passing along the street: *Wilmington v. Vandegrift*, 29 Atl. Rep. 1047.

The Queen's Bench Division has decided, that a bungalow, constructed of wood and corrugated iron, erected on a piece of land, for the purpose of exhibition and sale, not used or occupied, nor intended to be used or occupied on the spot where erected, is not a wooden structure, or erection of a movable or temporary character, under the English statute, and does not require a license for its erection: *London County Council v. Humphreys, Ltd.*, [1894] 2 Q. B. 755.

The Supreme Court of South Dakota has also recently rendered an interesting decision in regard to the powers of municipal corporations over property within their limits, in *City of Sioux Falls v. Kelly*, 60 N. W. Rep. 156, to the effect that: (1) A municipal corporation possesses only these powers, viz: those granted in express terms; those necessarily and fairly implied, or incident to the powers expressly granted;

and those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. (2) The right of a person to exercise dominion over his own property, and to build upon and improve the same, in accordance with the general laws of the land and municipal ordinances applicable alike to all citizens of a city, is secured by the fundamental principles of the constitution; and he cannot be compelled by the municipal government under which he lives to hold that right subject to the power of granting or refusing a permit to build upon or otherwise improve his property, vested in a city building inspector, from whose decision there is no appeal. (3) According to these principles a municipal ordinance, which prescribes that before any person can erect any building, or any addition thereto, within the city limits, he must first apply to and obtain from the city building inspector a permit, to be granted or refused at his pleasure, providing for no appeal from his decision, and subjecting the owner to a penalty in case he builds without such permit, violates the constitutional rights of the citizen, in that it makes the right of the owner of property to improve and use the same dependent upon the decision of the city building inspector, and is therefore void. This, of course, applies only where, as in the present case, there is no express grant of a power to pass such an ordinance. There can be no question as to the ability of the legislature to confer such power.

According to the Appellate Court of Indiana, when the public have been accustomed to travel a well-defined road across the land of a private person, though no **Negligence** right of way by user has been acquired, the owner is liable for injuries caused by stretching a barbed wire, not visible after dark, across such way, without anything to warn travellers of its existence: *Morrow v. Sweeney*, 38 N. E. Rep. 187. The Supreme Court of Vermont has recently announced a very salutary doctrine, in *Judd v. Ballard*, 30 Atl. Rep. 96, to the effect that it is actionable negligence for a person, while adjusting the handle of a loaded revolver, to hold it so that an accidental discharge will injure another;

and that if he does so hold it, he will be liable for any injury that may result.

The decision of the Court of Appeals of England, in *Lemmon v. Webb*, [1894] 3 Ch. 1, will prove very interesting to

Necessity

those whose property is of limited extent. In that case, large boughs of old trees standing on Lemmon's land had for more than twenty years overhung Webb's land; but finally Webb, without giving Lemmon any notice, cut off the boughs to the boundary-line. Lemmon then brought action against Webb, alleging that the latter had no right at all to cut off anything that had overhung his land more than twenty years, and that even if he had the right to cut the branches off, he was not entitled to do so without first giving notice. But the court held that the mere fact that the branches had overhung Webb's land for more than twenty years gave no right to have them remain in that position, and that notice was not necessary, as Webb did not go on Lemmon's land for the purpose of cutting them off.

The Supreme Court of Alabama is of opinion that an agreement by which one party is to furnish lumber and market the same when sawed, and the other party is to saw it on halves, makes a partnership: *Lee v. Ryan*, 16 So. Rep. 2.

The Chancery Division holds, that when an action is pending for the dissolution of a partnership, on the ground that

Assets

the defendant partner is of unsound mind, the court will grant an injunction to restrain the defendant from interfering in the conduct of the partnership affairs, so as to injure the business and assets of the firm: *J. v. S.*, [1894] 3 Ch. 72.

Following the weight of authority, the Court of Civil Appeals of Texas has recently decided, that when stock in a cor-

Pledge

poration has been pledged, and the shares transferred on the books to the pledgee, a bill in equity will lie to redeem the stock upon the refusal of the

pledgee to retransfer it; because the legal title being vested in the pledgee by the transfer, the pledgor has no other remedy: *Smith v. Anderson*, 27 S. W. Rep. 175.

The Supreme Judicial Court of Maine has just ruled, in *Mitchell v. Abbott*, 29 Atl. Rep. 1119, that when the offer of a reward is not acted on for twelve years, it will be presumed, in the absence of facts showing a contrary intent, that it has been revoked. This is in accord with the general rule. See an annotation on this subject in 1 AM. L. REG. & REV. (N. S.) 223.

The reports of the past month are rich in additions to the legal history of strikes. Judge Grosscup, in his powerful charge to the Federal Grand Jury at Chicago, reported in *In re Charge to Grand Jury*, 62 Fed. Rep. 828, set the seal of his disapprobation on the action of the railroad strikers in no uncertain manner. In his opinion, the open and active opposition of a number of persons, as in that case, to the execution of the laws of the United States of so formidable a nature as to defy for the time being the authority of the government, constitutes an insurrection, even though not accompanied by bloodshed, and not of sufficient magnitude to render success probable. This is in harmony with the charge of Chief Justice PAXSON, of Pennsylvania, made under similar circumstances, at the time of the Homestead riots: *Homestead Case*, (Pa.) in 1 D. R. 785..

Similarly, the Circuit Court for the Southern District of Ohio, in *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. Rep. 803, has decided that a combination to incite all the railroad employes in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing all railroad traffic, in order to starve the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employes more wages, they having no lawful right so to compel him, is an unlawful conspiracy by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise.

Quite as severe a setback was given to the arrogance of the strikers, when the Circuit Court for the District of Washington, in *Booth v. Brown*, 62 Fed. Rep. 794, held, that when employes of a railroad join in a general strike, without grievance of their own, for the purpose of compelling, by obstruction of travel and hindrance of traffic, parties to one side of a pending controversy to yield actual or supposed rights, and leave the service under such circumstances as make it necessary to fill their places in order to continue the operation of the road, the court will not, by reason of their past services, direct the receivers to reinstate them.

The Court of Civil Appeals of Texas has recently decided one of the strangest questions that was ever raised in a court of law, by declaring, in *Williams v. Ford*, 27 S. W. Rep. 723, that by payment of the services and expenses of an officer in performing an official act, a person does not become subrogated to any right in the fees allowed such officer!

According to a recent decision of the Court of Civil Appeals of Texas, it is not sufficient for a telegraph company, when the addressee of a telegram, not sent to the care of any one, is not at the place of address, to leave the telegram at that place, but reasonable diligence must be used to find him: *West Union Tel. Co. v. De Jarles*, 27 S. W. Rep. 792.

The Supreme Court of New York holds, that the rule that where the goods of an innocent person have been wrongfully mingled with the goods of another so that they cannot be separated, the whole bulk will be awarded to the innocent party, does not apply where the interests of third persons intervene, and full protection can otherwise be given to the innocent person whose goods were wrongfully used: *Nat. Park Bk. of New York v. Goddard*, 30 N. Y. Suppl. 417.

The Supreme Court of Alabama has lately ruled, in *Barn-*

hill v. Howard, 16 So. Rep. 1, that a collateral agreement
 Vendor and that one of the vendors of a yoke of oxen should
 Vendor be hired by the vendee at a stipulated price per
 day, "to drive the team and have possession and control
 until they are paid for, and as long thereafter as they can
 agree," gives possession to such vendor as a driver only, and
 he cannot, on non-payment of the price, detain them from the
 vendee.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. A. KILG, Esq., 725 Drexel Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

A TREATISE ON THE LAW OF RES JUDICATA, including the Doctrines of Jurisdiction, Bar by Suit and Lis Pendens. By HUKM CHAND, M.A. Printed at the Education Society's Steam Press, Byculla, Bombay. William Clowes & Son, London. William Green & Sons, Edinburgh. 1894.

THE NATURE OF THE STATE. By DR. PAUL CARUS. Chicago: The Open Court Publishing Co. 1894.

COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY. Being an Introduction to the Study of Contracts. By THEODORE W. DWIGHT. Edited by EDWARD F. DWIGHT. Boston: Little, Brown & Co. 1894.

A TREATISE UPON THE LAW OF PLEADING UNDER THE CODE OF CIVIL PROCEDURE. By PHILEMON BLISS, LL.D. Third Edition. Revised and Annotated by E. F. JOHNSON, B.S., LL.M. St. Paul: West Publishing Co. 1894.

EXPOSITION OF THE LAW OF CRIMES AND PUNISHMENTS. By JOHN B. MINOR, LL.D. Richmond: Printed for the Author, ANDERSON BROTHERS, University of Virginia. 1894.

A TREATISE ON GENERAL PRACTICE, containing Rules and Suggestions for the Work of the Advocate in the Preparation for Trial, etc. By BYRON K. ELLIOTT and WILLIAM F. ELLIOTT. Indianapolis and Kansas City: The Bowen-Merrell Co. 1894.

TENURE AND SOIL; OR, LAND, LABOR AND CAPITAL. By JOHN GIBBONS, LL.D. Chicago: Law Journal Print. 1894.

PLEADING AND PRACTICE IN THE HIGH COURT OF CHANCERY. By E. R. DANIELL. Sixth American Edition. Edited by JOHN M. GOULD. Boston: Little, Brown & Co. 1894.

SELECTED CASES, ETC.

A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW. By JOSEPH HENRY BEALK, JR., Assistant Professor of Law in Harvard University. Cambridge: Harvard Law Review Publishing Association. 1894.

CASES ON CONSTITUTIONAL LAW, with Notes. Part III. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever. 1894.

THE AMERICAN DIGEST. (Annual, 1894.) Being Volume VIII of the United States Digest, Third Series Annual. Also, the Complete Digest for 1894. Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul: West Publishing Co. 1894.

BOOK REVIEWS.

SOURCES OF THE CONSTITUTION OF THE UNITED STATES, CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY. By C. ELLIS STEVENS, LL. D., D. C. L., F. S. A. (Edinburgh). New York: MacMillan & Co. 1894, pp. 277.

This book occupies a new field. It is a systematic attempt to establish the original sources of the various provisions of the Constitution of the United States. The author very naturally finds them in the institutions of England, more or less modified by the colonial channels through which they came. No one who reads the book can fail to be impressed with the vastness of the institutional history back of the Constitution. Americans naturally feel complimented when Mr. Gladstone pats them on the back, and tells them that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man; "but but every well informed person knows that there is very little that is really new in the Constitution, and that far from being the result of the quiet and peaceful deliberations of learned philosophers and statesmen, it was really made up of the compromises of fiercely contending factions, and its final adoption only wrung from "the grinding necessities of a reluctant people."

Dr. Stevens' work furnishes a very complete answer to the exaggerated claims of Douglas Campbell on behalf of the Dutch origin of our national institutions. The audacity and brilliancy of Campbell's book at first carried the public with him, but sober second thought has convinced readers that there is little substance to the Dutch claims. We probably owe the public school system and election by ballot to Dutch suggestion, but very little else. Our Constitution laws and

institutions are of purely Anglo-Saxon origin, and Dr. Stevens' work clears the subject from all doubt.

The book is well printed, and is attractive in appearance. A few minor errors may be noted. On page 22, 1631 should be 1681. The articles of Confederation were not in operation for ten years from 1777 to 1787, as appears to be suggested on page 40. They were adopted by Congress in 1777, but not by the States until 1781. They were in operation from 1781 to 1789, when the Constitution took effect.

ALBERT B. WEINER.

COMMENTARIES ON AMERICAN LAW. By JAMES KENT, LL. D.,
Chancellor of the State of New York. In one volume.
Edited by WM. HARCASTLE BROWNE, A. M., of the Philadelphia Bar. St. Paul, Minn.: West Publishing Co.
1894.

The literary style of a legal text book is an important factor in any estimate of its worth, especially in the case of those works which from their general character would seem to be designed for the use and instruction of laymen as well as of members of the profession, and this is particularly true of KENT'S "Commentaries on American Law." This work was last revised by the author about fifty years ago, and the value of the greater part of the text as an authority on the law of this country is at present small, and becomes less every year as the gap between past and present widens.

Mr. BROWNE has in the edition before us attempted to give KENT a present practical value, but his treatment has hardly met with success. The original KENT possesses great value for a certain class of laymen for whom some general knowledge of the law of their country is almost as necessary as it is advisable, but the present edition has not that value, the style of the author being completely lost in the editor's short and concise paragraphs, which smack strongly of the digest, and which have too little literary connection for pleasant reading. The fault, however, is almost entirely with the arrangement, for the editor's work is very conscientious, the real meat

of KENT being judiciously and thoroughly extracted and clearly set forth. Still the work is without that attractiveness which commended it to the general reader, and the charm of the learned chancellor's work is gone. One misses also the references to those general authorities such as WARD, PRESTON, POTHIER, GROTIUS and others, which are always interesting to the scholar. And this brings us to what we consider a very grave objection to the character of this edition, though we are aware that much can be said upon the other side. The editor has omitted almost all of the notes. A text as old as KENT's requires references to the authorities upon which its propositions are based, so that the student may have some guide as to the relative value of those propositions and may not be obliged to store his mind with an indiscriminate mixture of good and bad law. Well chosen references furnish the student with a basis for independent investigation, and while this may not be so necessary to those who study under the overseeing eye and reasonable advice of an instructor, as is the case in our great law schools, yet it is important for the large number of students who have not that advantage. Their reading of the present edition of the Commentaries would probably result in the acquisition of a large mass of unproved matter which would be a stumbling block in their future progress.

But this lack of references most seriously affects the character of Mr. BROWN's work in those instances where a note could have easily supplied either information on the general changes of the law in the last fifty years or a correction to the text itself as, for instance, references to the Civil War and its effect upon Slavery, the International Copyright Law, the institution of the Interstate Commerce Commission and the Circuit Court of Appeals, the Indian question and the like; and notes of the facts that certain of the year books have been translated, that words which would ordinarily create an estate-tail are now by statute in many states to be construed as creating estates in fee simple; that the doctrine that a married woman's contract amounts to an appointment of her separate estate has been exploded, and that to the list of states in which it is

stated that the remedy by distress has been abolished the names of at least a dozen other states may be added. The editor might also have omitted in his digest of the text many references to New York Statute Law without depreciating the value of the book as a general treatise on American law. An examination of the whole of the present edition confirms the impression that he who would furnish the public with a valuable Commentary on American Law should either republish KENT as last revised by the author himself or write a new one in the light of modern and recent decisions.

ROBERT P. BRADFORD.

HAND-BOOK OF COMMON-LAW PLEADING. By BENJAMIN J. SHIPMAN. St. Paul, Minn: West Publishing Co. 1894.

This volume is another of the deservedly popular Hornbook Series, and possesses in an eminent degree all the peculiar excellences of that system of text-books, already described in a review of Clark's Criminal Law, published in the August number of the current volume of this magazine. It will, therefore, as well as by its individual merits, add to the prestige that series has already acquired, and is enhancing with each successive volume. Books of this kind are eminently adapted to the needs of students, who should acquire a firm grasp of the fundamental principles of the law, before burdening their minds with the mass of trivial and often inconsistent detail that disfigure so many so-called text-books, and makes them little else than a disorderly digest of cases. To disinter the underlying principles from the superincumbent mass of chaff, is a task equally beyond the inclination and the power of a student, and often proves a task to the experienced lawyer. On all sides, therefore, a text-book which clings closely to the central idea which its name represents, is sure to be gladly welcomed.

The subject of this volume is a most important one. In spite of the prevailing mania for innovation and for the cultivation of ignorance and carelessness, which has nowhere displayed itself to better advantage than in legal matters, the

knowledge of the principles of common-law pleading is an absolute essential to the mental equipment of every lawyer,—as essential under a code as under the old system to which they owe their origin. No omission of a material averment, no duplicity in the strict sense of the term, no negative pregnant, is allowable in a “proceeding called an action,” any more than in a common-law declaration. Thousands of lawyers are daily paying the penalty of their wanton disregard or wilful ignorance of that fact.

But while the main principles of pleading are thus essential, the minutiae of the old system are no longer applicable in most of the United States; and our book accordingly does not attempt to give them. To do so would indeed be beyond its scope. But it will be difficult to find any important point that the author has overlooked, or any important case that he has neglected to cite. The accuracy of his statements of principles also seems to be unexceptionable, though the wording might, perhaps, in rare instances, be improved.

As possessing special value may be mentioned the discussion of pleading in assumpsit, the statement of parties, the special traverse, and negatives pregnant. On some of these the author's treatment, while not so scientific as that of Stephen, is decidedly clearer to the average student, from its very want of technicality.

The index might have been made a little fuller, for with a new arrangement of the subject, such as in this book, comes a corresponding difficulty in finding the subject wanted, and then some branches of pleading are so well known under pet names that it is never well to omit them. The lawyer will search the index in vain, however, for his old friend, “*absque hoc*,” though he will find it safe and sound under its more technical, though less familiar, name of “special traverse.”

There are some matters treated of in the book, such as verdicts and new trials, that would seem to belong rather to practice than to pleading; but these imperfections are but slight when compared with the substantial value of the work. There is every reason to believe that it will to a large extent supplant the work of Mr. Stephen, so well-known to older gene-

rations, as a practical text-book for the student of law, and it will certainly serve as a useful book of reference for the busy practitioner. .

R. D. S.

PROBLEMS AND QUIZ ON COMMON-LAW PLEADING. By EARL P. HOPKINS. St. Paul, Minn.: West Publishing Co. 1894.

This handy little collection of questions on Pleading seems upon examination to be as it professes, "especially adapted for use with SHIPMAN's Hand-book of Common-Law Pleading." It also appears to belie its innocent appearance, for while most of the problems stated are such as a student can readily solve with a little thought, there is sandwiched in here and there, by way of seasoning, one of those articles known as catch-questions, which even courts have not yet solved with unanimity. This does not detract from its value, however, and it will be found most useful to the student by affording him an opportunity for a practical application of the principles learned, without which the study of law would be a drier field of knowledge than the valley of dry bones.

R. D. S.

ARCHITECT, OWNER AND BUILDER BEFORE THE LAW. By T. M. CLARK, Fellow of the American Institute of Architects. New York: McMillan & Co. 1894. Price, \$3.00.

This is a law book written by an architect. It is divided into three parts, which treat, respectively, of the architect and the owner; the architect and the builder; and the builder and the owner. Each part is divided into chapters, which cover quite fully all the ordinary questions of law likely to arise between the respective parties. Many decisions have been consulted, and important cases are quite fully cited.

The book having been written by an architect, the point of view, in some instances, is different from that which would be taken by a lawyer; but there are few, if any, statements of the law which would mislead the lay reader. Considering that the book was not written by a lawyer, its breadth and accuracy are remarkable; and the fact that its author has had special

experience and training in the practical working of the relations of which he treats, gives his comments and criticisms a point and suggestiveness that might have been lacking if the book were from the pen of a trained lawyer who was without this special experience.

Architects, builders and owners will find the book interesting and valuable as giving them the legal aspect of their relations; and lawyers who have to do with the subject-matters treated of, will be thankful to find so many cases collected and clearly stated on matters not covered satisfactorily by any other treatise known to the writer.

One of the strongest evidences of practical wisdom in the writing of the book is shown by the author not attempting to give the mechanic's lien laws of the different states, which he speaks of as in "a constant state of transition," a remark, the force of which particularly appeals to a Pennsylvania lawyer.

At the end of the volume are three forms of contracts between the builder and the owner, which are worthy of being consulted by any lawyer who has a contract of this kind to draw or pass upon, especially the third form.

An alphabetical list of cases cited, and a second list giving the cases of each state alphabetically, are given. The index is reasonably full, but seems to the writer not as well executed as the rest of the book.

B. H. L.

A TREATISE ON DISPUTED HANDWRITING AND THE DETERMINATION OF GENUINE FROM FORGED SIGNATURES; THE CHARACTER AND COMPOSITION OF INKS, AND THEIR DETERMINATION BY CHEMICAL TESTS; THE EFFECT OF AGE AS MANIFESTED IN THE APPEARANCE OF WRITTEN INSTRUMENTS AND DOCUMENTS. By WILLIAM E. HAGAN, Expert in Handwriting. (All rights reserved.) Albany, N. Y.: Banks & Brothers. 1894.

This book came to our hands for review after Prof. FRAZER's work had been read, and has been read entirely through, with

the exception of some of the cases in the appendix. There are many things in this book which are valuable, but in our judgment the author places entirely too much stress upon his theory of muscular co-ordination and pen pressure as furnishing the means of identification of disputed writings. A very large portion, and, in our opinion, a very undue proportion of Mr. HAGAN's book is occupied in discussion of this theory. While this is a valuable means of investigation, it is only one of many, and in our experience not by any means the most valuable. In our opinion, Professor FRAZER has more correctly formulated the weight to be attributed to this method of investigation. On page 74 of his book, referring to this subject, he used the following language: "Within certain limitations it is an important object to study, and may give indications of value to corroborate or refute the hypotheses based upon other lines of study."

His statements in the chapter on chemical testing of inks and in his account of the Davis Will Case, are not always correct, and in this respect we do not regard the book as reliable. For instance, on page 247, the author states, referring to the test of the inks in the will in the Davis Will Case, that "the fact that it turned the ink red, and this would be the reaction it would have upon logwood ink, did not fully establish the identity of the latter, for according to the best chemical authority this same reaction would have occurred were it made from analyne [sic] black (see Allen's Commercial Organic Analysis, edition of 1889, page 130)." Referring to the authority cited, we find the following: "Logwood ink marks are mostly reddened by oxalic acid, and alizarin marks become bluish, but aniline inks are unaffected. With hydrochloric acid, logwood ink marks turn reddish or reddish-grey, alizarin marks greenish, and aniline ink marks reddish or brownish-grey." The author, however, does not seem to have studied Mr. ALLEN's work with very great care, for if he had consulted page 252, he would have found the following: "Aniline black differs remarkably from most other aniline colors, in that it is *wholly insoluble in water*, alcohol, acids, soap-lye and alkaline solutions.

Hence the application of ready-formed aniline black is very limited, and it is usually produced in the fibre itself. It yields an extremely fast and pure black on cotton, but it is not well suited for dyeing silk or wool." From this it appears that analine black, which by the way is improperly spelled by Mr. HAGAN, being insoluble in water cannot be used and is not used in making ink in which water is the only solvent used. It further appears on the same page of ALLEN that analine black is either wholly unchanged by acids or turned slightly greenish and not red.

We might criticise further his report of the Davis Will Case, for we know from personal inspection of the document that many other statements therein contained are inaccurate and untrue. We will instance only one on page 249, where he states that the signature in question was plainly a traced signature. We state from personal inspection of the document that there was not the slightest evidence of tracing in or about it. In many other cases, the author assumes things as proved upon the trial upon which there was a very great conflict of testimony, The jury disagreed. The report as a whole is altogether biased and inaccurate.

Considering the involved style in which the book is written, that undue space is devoted to a pet theory, the accuracy of the chemical part of the work, and the manifest bias of the author in the statement of cases so far as we have examined it, we do not regard the book as an entirely accurate exposition of the science which it reports to treat.

M. D. EWELL.

The Kent Law School of Chicago.

A TREATISE ON THE LAW OF WILLS AND ADMINISTRATION.
By ROBERT PRICHARD, of the Chattanooga Bar. Chattanooga: MacGowan & Cooke, Printers. 1894.

It is not often that one can read with interest a book avowedly devoted to the practice in the courts of one particular state, and when such a duty proves a pleasure instead of a dreary task it is a matter for congratulation. Such has proved

the case with Mr. PRICHARD's work. It is that *rara avis* in the world of scientific publications, an interesting treatise on a purely technical subject. The Law of Wills and Administration must, of necessity, be treated within somewhat narrow limitations. Since it has become so purely statutory, reference can be made to but one locality, and Mr. PRICHARD's work, as he tells us, is "first of all a Tennessee book." The arrangement cannot be criticised. First, a general introduction. Then Part I, the Law of Wills, under which will be found titles relating to Testamentary Capacity, Execution of Wills, Probate and Construction of Wills. Part II, the Law of Administration, contains Appointment and Qualifications of Executors and Administrations, Assets and Inventory, Powers and Duties of Executors and Administrators, Distribution and Settlements, Real Assets and Insolvent Estates. There is a carefully prepared index of nearly one hundred pages, but no table of cases cited. Under every title the scheme adopted is carefully and logically worked out. Nothing is omitted upon which a question could arise. Forms of practice are introduced under their appropriate chapters, which will, without doubt, prove most useful to local practitioners. The exceptional qualities of this work, however, will be found in the author's own peculiar province the text itself. Clear, concise and forcible, patient in explanation, yet not burdened with anecdotal extracts from decisions, it well fulfills the purpose for which it is intended. One thing is to be regretted, as it can only be accounted for as an author's hobby. With a desire to be aggressively modern and American the author has practically excluded English references and decisions. It is true that in actual practice the local jealousy of courts has effectually checked the citation of English cases in briefs, and in notes therefore intended merely for local briefing purposes they are no longer an important feature. But there can be for us no thoroughly scientific presentation of a legal topic that does not carry us back through the centuries of English influences and institutions. The law of decedent's estates in Tennessee did not spring, Minerva-like, from the heads of the county justices of Tennessee or North Carolina, the mother state. This point

would be a matter for serious quarrel with the author, did he not embody in his text the sound doctrines of English judges and chancellors with an invigorating freshness and strength that we dearly delight to claim as a national trait.

WM. H. LOYD, JR.

THE PRINCIPLES OF THE LAW OF REAL PROPERTY. Part I.
The Estates at Law and in Equity. By CHRISTOPHER
STUART PATTERSON. Philadelphia: Allen, Lane & Scott.
1894.

This modest little pamphlet, which contains an outline of the first year's course in the Law of Real Property in the Law School of the University of Pennsylvania, has, within it, more solid meat than is to be found in many a text-book of twice its size. It is not a text-book, as that word has now come to be understood in legal literature, but is, nevertheless, one in the real sense of the word—a scientific arrangement of the principles which govern its subject-matter, developed in logical order, with cases added to elucidate the application of those principles. While not a book that appeals to the practising lawyer, simply because it does not contain the mass of detail that is necessary for his purposes, it will, nevertheless, not be wholly a waste of his time to consult it as a book of reference, or to freshen the memory of those who are apt to forget principles in the mass of case law that each year pours forth inexhaustibly; and it is simply invaluable to the student, presenting, as it does, in a readily-accessible form, the information to acquire which he would otherwise be compelled to grope through an interminable labyrinth, with scarcely a ray of light to guide him. X.

AMERICAN ELECTRICAL CASES. Edited by WILLIAM W.
MORRILL. Volume I. Albany, N. Y.: Matthew Bender.
1894.

With the growing importance of electricity as a factor in

human affairs, litigation in regard to this wonderful and mysterious power must necessarily increase. It is perhaps not an unsafe prediction that at the end of the next twenty-five years, nearly one-half of the decided cases will involve an application of legal principles to the determination of some vexatious questions relating to this agency. As electricity has revolutionized existing material conditions whenever introduced, so it may require in its workings the application of legal principles other than those which are now applied in similar cases.

The importance, therefore, of keeping in touch with the growth and development of the law of electricity can hardly be underestimated. The collection of all important electrical cases and publication in one series of books to be known as *American Electrical Cases* will greatly facilitate both the lawyer and the electrician in making and keeping themselves up with the decisions relating to this important agency.

The first volume of the proposed series contains one hundred and fifty-five complete reports of decided cases, and, in notes, memoranda of over thirty additional cases decided between the years 1873 and 1885. Each case is followed by a short annotation, varying in length from one line to a page and a half, which contains a list of the cases in the volume in which the particular case is cited, cross references to other cases involving a discussion of similar principles and references to earlier cases with short digests of some of the leading ones. About seven pages of the book are devoted to a "general note" which contains short digests of cases decided during the period covered by the volume, but which for various reasons were not selected for reprinting in full. At the end of the book there is a full index, under each heading of which are collected short digests of all the cases relating to the subject indicated. The index, therefore, consists practically of a collection of short annotations under appropriate headings.

As nearly all of the cases in Volume I relate to telegraph companies, the book can hardly be said to present anything new to the profession, this subject being well covered by the various works on telegraph companies. The succeeding volumes will doubtless contain much that is new, and with the

increase in litigation in this subject should prove useful and convenient aids to the profession.

EDWARD BROOKS, JR.

NEW ROADS AND ROAD LAWS IN THE UNITED STATES. By ROY STONE, Vice-President National League for Good Roads, etc. New York: D. Van Nostrand Co. 1894.

Although this book does not, strictly speaking, belong to the domain of legal literature, it will nevertheless be read with profit by all lawyers interested in the broad and important subject of road improvement. The wretched roads which disgrace so many sections of the country are evils which must be corrected not only by the adoption of scientific methods of construction, but also by radical changes in the antiquated road laws and in the system of public expenditure. Mr. Stone devotes the greater part of his work to a description of the kinds of roads suitable for various localities, etc., and gives us some very encouraging information as to the practical value resulting to the farmer by the laying of smooth, hard surfaces without the accompaniment of increased taxation. The appendix contains the substance of the recently enacted road laws of sixteen states, as well as the schemes for much needed legislation and plans for state aid in several important states. It is to be regretted, however, that the author did not dwell upon the incomplete and unpractical features of the old road laws (still in force, alas, in too many states), and contrast them with the new provisions.

The book is exceedingly well turned out. The illustrations add much to the interest.

W. S. E.

TABLES FOR ASCERTAINING PRESENT VALUE OF VESTED AND CONTINGENT RIGHTS OF DOWER, CURTESY, ANNUITIES AND OF OTHER LIFE ESTATES; DAMAGES FOR DEATH BY WRONGFUL ACT, ETC. Computed and Compiled by FLORIEN GIAUQUE, A.M., and HENRY B. MCCLURE, A.M. Cincinnati: Robert Clarke & Co. 1894.

These tables, based chiefly upon the Carlisle Table of Mortality, appear to have been prepared with anxious care by the compilers, who represent themselves as having taken every precaution to prevent errors, whether in computation or in the printing. The profession will undoubtedly find this volume of great service in the solution of the complicated "present value problems," which so frequently arise in the domain of real property law, and also in the determination of troublesome questions relating to the true measure of damage for the premature termination of life by negligence or wrongful act. The volume contains Life and Annuity Tables, with rules for their use in respect of vested and contingent dower and curtesy rights and damages for injury, a death from another's wrongful act, negligence, etc.; the Bowditch Table, table of expectancy of life as shown by the Carlisle, the Combined Experience, the American Experience, the Thirty Officers' Experience, the Farr No. 3, and the Northampton Tables of Mortality, etc., etc. There is also a table and rule for ascertaining the present value of any sum at 2, $2\frac{1}{2}$, 3, $3\frac{1}{2}$, 4, $4\frac{1}{2}$, 5, 6, 7, 8, 9 and 10 per cent. for any number of years from one to eighty, inclusive. This latter table is especially valuable. It is computed upon a compound interest basis and the formula used is $\frac{1 - (1 + i)^{-n}}{i} = \frac{1 - v^n}{i}$.

In view of the number of decisions in favor of the admissibility of such tables as evidence in suits involving the questions to which they relate, the importance of having this volume at hand cannot readily be over estimated. The tables are printed in type that is admirably clear and the arrangement of the figures is in all respects satisfactory. G. W. P.

A LEGAL DOCUMENT OF BABYLONIA. By MORRIS JASTROW, Jr., Ph.D. From the "Oriental Studies" of the Oriental Club of Philadelphia. 1894.

In this little pamphlet Dr. JASTROW discusses a Legal Document of Babylonia, dealing with the rescission of an invalid contract of sale. The "Document" in question is

a little clay tablet owned by Mayer Sulzberger, Esq., of the Philadelphia Bar, and is said by Dr. JASTROW to be in an excellent state of preservation. Dr. JASTROW classifies the legal documents of Babylonia under four heads, which (if we may reduce them to the terms of modern legal parlance) correspond to (1) due bills and receipt; (2) bills of sale; (3) deeds, settlements and formal executory contracts; and (4) judicial records. He comments upon the value of these documents as containing important incidental evidence of manners and customs in ancient Babylonia; and he then translates the document in question and finds that it belongs to the fourth class. The date is fixed at 642 B. C. One Aplā affected to sell to Nurea real property over which he possessed no power of alienation. Nurea paid the consideration and (it is assumed) entered into possession. A paternal uncle of the vendor's then asserted a title to the property and, upon restoration of the consideration to Nurea, the latter surrendered the deed to the claimant. All the parties being before the court complete justice seems to have been done by combining many of the features of ejectment, the action for money had, and received, and the common law fine. Dr. JASTROW's scholarly and suggestive comments upon the document in question and upon Babylonian documents in general will be read with great interest by those into whose hands this pamphlet comes.

G. W. P.

GREAT DISSENTING OPINIONS OF THE SUPREME COURT OF THE UNITED STATES. A Paper Read at the 17th Annual Meeting of the American Bar Association (1894). By HAMPTON L. CARSON, of the Philadelphia Bar. Reprinted from the Transactions of the Association.

For his address to the Bar Association Mr. CARSON selected a subject as fortunate as it is unusual. Dissenting opinions are too generally looked upon as feeble remonstrances of stubborn members of the court against the decision of the majority, or as something, at all events, which is not the law,

hence does not concern the practitioner. The student, however, should no more overlook the opinion of the minority upon an important question than he should the argument of counsel for the losing side. But the dissenting opinions of the United States Supreme Court have, in several notable cases, an importance greater than to the student merely, for they have, as Mr. CARSON points out, become finally the settled law of the land. Only one entirely familiar with the history of our highest tribunal, with the careers of the men who from time to time have composed it, and with the opinions they have delivered, as well as with the circumstances which influenced those opinions, could have presented in such a scholarly and critical manner the sketch of these great protests. History of a kind that is not elsewhere obtainable (unless it be from the same author's great work on "The History of the Supreme Court") is contained in this little pamphlet.

W. S. F.

AN ILLUSTRATED DICTIONARY OF MEDICINE BIOLOGY AND ALLIED SCIENCES. By GEORGE M. GOULD, A.M., M.D. Boston, Mass.: Little, Brown & Co.

This work consists of 1633 large octavo pages. From such examination as we have been able to give, it appears to have fulfilled all the promises made by the publishers concerning it. It contains a large number of new words and definitions from all the correlated sciences.

We notice among its editors the names of Dr. CHAS S. DOLLY and Dr. BURT G. WILDER, each of which is a sufficient guarantee of the accuracy of the departments under their charge. The work gives the pronunciation of every word and is profusely illustrated.

It has numerous useful tables, such, for example, as those of Surgical Operations, Tumors, Animal Parasites, Composition of Electrical Batteries, Pigments, etc., besides the usual Bacteriological, Chemical, and Anatomical Tables.

To the medical practitioner, such a book must be indispensable, and to the legal practitioner who, at the present day,

may at any time be called upon to deal with new and important questions involving a knowledge of medical science and its collateral branches, it seems to us almost equally necessary. It is impossible in the brief space of a book notice to give anything like an adequate view of so important a work. In our opinion, it should be found in every law library. It seems almost unnecessary to state that the book is admirably printed and bound.

M. D. EWELL.

The Kent Law School of Chicago.

DIGEST OF INSURANCE CASES. By JOHN A. FINCH. Indianapolis: The Rough Notes Co. 1893.

Our readers will perhaps recall the review of an earlier volume of this work which appeared in 31st AM. LAW REG. 545. That review was, on the whole, favorable. We then had before us the Digest for the year ending October 31, 1892. The volume in hand brings the work down to October 31, 1893. It is gratifying to be able to quote with reference to the later work the commendation which was bestowed upon the earlier. "Mr. FINCH has done his work well. The cases are carefully digested, the classification is good and the index is remarkably complete."

G. W. P.

The Editors also wish to acknowledge the receipt of two excellent manuals (1) "Vandegrift's United States Tariff," a handbook containing the completed schedules of the new tariff act, a full explanation of customs requirements and of the laws and regulations regarding drawback, etc., published by F. B. Vandegrift & Co., New York and Philadelphia.

And (2) "Jewett's Manual for Election Officers and Voters in the State of New York, containing the General Election Law and Town Meeting Law complete with Amendments to date. The provisions of the Penal Code, Laws and Constitution of the State are also inserted. The book is invaluable to the New York practitioner, and is calculated to save him

much time and trouble. It is published by Matthew Bender, Albany, N. Y.

The First Annual Report of the Territorial Bar Association of Utah has reached us, and contains an address upon the "Codification of the Law" by Mr. Hiles, and one by Mr. Murphy upon "The Use of the Writ of Injunction to Prevent Strikes."

The review of Part II of Professor Thayer's Cases on Constitutional Law will appear in connection with that of part III, which has just appeared.

RICHARD C. McMURTRIE.

Richard C. McMurtrie^{*} was born in Burlington County, New Jersey, on October 24, 1819. He died at Chestnut Hill, Philadelphia, on the 2nd of October, 1894.

Mr. McMurtrie was admitted to the Bar at Philadelphia on the 12th of November, 1840.

His character as a man and as a lawyer was most admirable and noteworthy; and it would seem to be useful to recall some of the causes, in which during his long professional life he was engaged, as in this way his characteristics may be best illustrated. Some of these cases were of high public concern, and many of them involved private interests of the greatest personal and pecuniary importance.

It may not be generally known that Mr. McMurtrie in his youth was engaged in a fugitive slave case. Quite early in his career he was retained by a southern gentleman to enforce the return of a fugitive slave. It is believed that this professional engagement did not coincide with Mr. McMurtrie's personal feelings, but he conceived it to be his duty to represent his client in the assertion of his legal rights, and, although the case was one which was opposed to the then prevailing public sentiment in the jurisdiction, where the question was determined, he did not hesitate to lend his fullest powers to the support of the contention, which he felt his duty required him to advocate.

In the prime of his life Mr. McMurtrie was engaged in very many important causes, of which three, perhaps, deserve special mention. The first is that of the City of Philadelphia v. Collins, 68 Pa. 106. It was a case really of great public moment. The particular suit, it is true, was whether a canal boatman, who had been hindered in his navigation of the canal by the city's action in drawing off the water of the Schuylkill for the purpose of securing power to the Fairmount

Water Works, could recover damages for the detention of his boat ; but the decision of this particular suit involved a consideration of the right of the city to take water of a navigable stream, not for the purpose simply of domestic use by riparian owners, but, under an agreement with the grantee of the State, in order to furnish power to pump the water into the reservoir of the water works. The contention *against* any such right on the city's part and for its liability for the wrong done was successfully supported by Mr. McMurtrie in the court below and (on a writ of error taken by the city) in the Supreme Court.

In the *Credit Mobilier v. Commonwealth*, 67 Pa. 233, Mr. McMurtrie twice secured a reversal of the decision of the Dauphin County Court, which had been in favor of the Commonwealth—the second time with an expression of opinion that binding instructions should have been given in favor of his client. The question was whether the Commonwealth was entitled to tax profits earned in building a railroad, and which, under the terms of an assignment of the contract, were to be divided among parties, who were stockholders in the *Credit Mobilier*. It was held by the Supreme Court that the profits so made were not those of the corporation and not, therefore, taxable as such.

In *Lewis, Trustee, v. United States*, 92 U. S. 118, the treasury of the general government was saved an enormous sum by the efforts of Mr. McMurtrie and his colleague in securing the priority given by the statute to debts due the United States, as against the estates of individual partners in the firm of Jay Cooke, McCullough & Company. To one of the departments of the government the importance of this victory cannot be overestimated ; and Mr. McMurtrie's forensic efforts by which this success was mainly secured were such as to display in their clearest light his great knowledge of law and his unsurpassed ability as a close and logical reasoner.

The foregoing have been selected as those causes, which brought Mr. McMurtrie most prominently before the profession and the public at large, and they illustrate better, perhaps, than can be done in any other way certain qualities of

his personal and professional character. In one or the other of these causes he showed himself to be a man absolutely fearless in the discharge of duty, capable of a most accurate construction of apparently conflicting public and private rights, one able to handle with ease the gravest questions between the State and its citizens, and, finally, one who had the capacity to determine, and enforce upon the attention of the court, the exact measure and just application of doctrines of the greatest importance both of equity and of commercial law, in a case requiring the most profound knowledge of both.

The readers of this magazine may well recall Mr. McMurtrie's contributions to its pages, and it is not necessary in this article to dwell upon his characteristics as a public-spirited citizen and a broad-minded and profound lawyer, which were displayed in these writings.

GEO. TUCKER BISPHAM.

The editors of the *AMERICAN LAW REGISTER AND REVIEW* cannot refrain from taking this opportunity of expressing their sense of loss in the death of Mr. Richard C. McMurtrie. As Mr. Bispham has said, Mr. McMurtrie was a great lawyer. Those of our readers who live far from the city where his life was spent, have only to read the articles which he published in this magazine to realize that fact, but it is of his personal and professional character, as seen from the standpoint of the younger members of the profession, of which we desire to speak. All young lawyers who came in contact with Mr. McMurtrie realized, in spite of a certain indifference in manner and bluntness of address, that he felt a sincere interest in the success of their professional labors, and in their acquisition of correct ideas on legal subjects. To those whom he knew were really interested in law as a science, he never failed to pay that compliment which is the highest of all compliments an old man can pay to a young one—the explaining of his own ideas and combatting the young man's opinion as if that opinion was as weighty as the decision of a learned judge. As a consequence of this characteristic, which was one of the

marks of his true simplicity of character, not only is his loss felt as a personal one by his contemporaries at the Bar, but even by those who were almost by a half a century his juniors. It is therefore true that the influence of his professional life was not limited to those of his own age and generation, but extended throughout the profession from its oldest to its youngest member.

After the announcement in the October number of the competition prizes offered by the AMERICAN LAW REGISTER AND REVIEW for the best annotation to be contributed to its pages, the attention of the Editors was called to the fact that the author of the annotation to which the first prize was awarded had drawn upon Mr. Bennett's note to his edition of Benjamin on Sales to such an extent as to deprive the annotation, in the judgment of the Editors, of that feature of originality which is essential to such a piece of work. While it is quite possible that the excessive use of the authority in question was the result of a misapprehension upon the part of the writer of the annotation with respect to the nature of the work required of him, it is nevertheless entirely clear in the minds of the Editors that no alternative is open to them but to modify the decision as announced and to award the first prize to Miss Mary Bartelme, whose annotation had secured the second prize.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

DECEMBER, 1894.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR NOVEMBER.

Edited by ARDENUS STEWART.

The Supreme Court of New Jersey has lately decided, in *Lynch v. N. Y., L. E. & W. R. R.*, 30 Atl. Rep. 187, that a
Actions suit is not commenced by the signing and sealing
of a summons, which has been retained in the
office of the attorney, without any purpose of immediate
service.

According to the Circuit Court for the Southern District of
New York, as expressed in *In re Howard*, 63 Fed. Rep. 263,
Attorns an "undercoachman," whose duties are partly to
assist in keeping stables, horses and carriages in
good order, but principally to drive the horses when his em-
ployer, or any of his family, go out in carriages, and to
accompany on horseback the younger members of the family
when they go out on horseback; and who boards with his
employer's coachman, and sleeps in a room over the coach-

house, is a "personal or domestic servant" within the meaning of the U. S. Statute of 1885, c. 164, prohibiting the immigration of aliens under contracts for labor, and providing that the provisions of the act shall not apply to "persons employed strictly as personal or domestic servants." Since, however, the Statute of 1888, c. 1210, makes the decision of the Secretary of the Treasury on such subjects conclusive, the court declined to discharge the relator on *habeas corpus*.

The Court of Civil Appeals of Texas has recently ruled, that when an insolvent debtor executes, as part of the same transaction, several interdependent deeds of trust, passing title to all his property subject to execution, for the benefit of certain creditors, with a provision that the surplus, if any, is to be distributed among his other creditors, holding legal claims, the deeds constitute a general assignment: *City Natl. Bk. v. Merch. Natl. Bk.*, 27 S. W. Rep. 848.

In the opinion of the Supreme Judicial Court of Massachusetts, when money is deposited with the cashier of a bank, under an agreement that it shall be invested by the bank in bonds and stocks, the bank is liable for the return of the money, no investment having been made, though the agreement for investment by the bank was *ultra vires*; and the fact that the cashier embezzled the money will not affect the bank's liability: *L'Herbette v. Pittsfield Natl. Bk.*, 38 N. E. Rep. 368.

The Supreme Court of Minnesota has rendered a decision which will be welcome to all devotees of bicycling, for the manner in which it asserts their rights upon public highways. The substance of that decision is, that where a bicyclist is riding along a highway, and a horse takes fright at him, he will not be liable in damages to any one injured thereby, unless he was acting in disregard of the rights of others. The highway is intended for public use, and a person driving a horse thereon has no rights superior to

those of a person riding a bicycle. A bicycle is a vehicle, and riding one in the usual manner, as is now done upon public highways, for convenience, recreation, pleasure or business, is not unlawful; "they cannot be banished, because they were not ancient vehicles, and used in the Garden of Eden by Adam and Eve:" *Thompson v. Dodge*, 60 N. W. Rep. 545.

In the opinion of the Supreme Court of Pennsylvania, an act, which directs municipal officers to award certain contracts to the "lowest responsible bidder," vests ^{Bids} discretionary, and not merely ministerial powers in such officers, the word "responsible," as therein used, applying not only to pecuniary ability, but also to judgment and skill: *Interstate Vitrified Brick and Paving Co. v. City of Philadelphia*, 30 Atl. Rep. 383; following *Comm. v. Mitchell*, 82 Pa. 343; *Findley v. Pittsburgh*, 82 Pa. 351; *Douglas v. Comm.*, 108 Pa. 559; *Pavement Co. v. Wagner*, 139 Pa. 623; S. C., 21 Atl. Rep. 160.

The Supreme Court of South Dakota, in *Merchants' Natl. Bk. v. McKinney*, 60 N. W. Rep. 162, has ruled, that a stenographer's or referee's notes of evidence cannot, by ^{Bill of Exceptions} stipulation of the parties, take the place of the bill of exceptions, or of the statement of the case settled by the judge, which must be returned to the Supreme Court by the clerk of the court below, as part of the judgment roll.

In the recent case of *Charles Tyrrell Loan & Bldg. Assn. v. Haley*, 30 Atl. Rep. 154, the Supreme Court of Pennsylvania ^{Building Associations} held, that a member of a building and loan association, whose shares have not matured according to the mode of computation originally adopted by the association, and used by it for nearly thirty years, is not estopped from claiming that by another and more just method of computation his shares are matured. FELL and MITCHELL, JJ., dissented, however, and it would seem with good reason. In the first place, the association, in the absence of any statutory

restrictions, certainly has a right to adopt any method, not manifestly unjust, of computing the value of its shares, which it pleases; and in the second place, the member, having taken his shares with full knowledge of the fact that such method of computation was the rule of the association, and not having objected to it previously, as applied to the shares of others, ought not to be heard now to raise that objection.

The Supreme Court of Michigan has lately ruled, in *Zagelmeyer v. Cin. & M. Ry. Co.*, 60 N. W. Rep. 436, that a Carrier. railroad company cannot impose, as a penalty for Fare not purchasing a ticket, such a sum that the fare collected on the train, including that additional amount, shall exceed the maximum rate of fare allowed by law.

The Court of Civil Appeals of Texas has just rendered a curious decision, in *Pac. Exp. Co. v. Black*, 27 S. W. Rep. 830, that a husband may recover from an express Negligence company, which has failed to promptly deliver medicines shipped to his wife, damages for both the physical and mental suffering of the wife, but not for sympathetic mental suffering by him on account of the wife's pain. The latter is too remote.

The ruling of the Supreme Court of North Carolina, in *White v. Norfolk & S. R. R.*, 20 S. E. Rep. 191, is of great importance to travellers, though fortunately the Torts of Servants state of facts which gave rise to it is not of frequent occurrence. The court held that a carrier is liable to a passenger for damages, if one of the crew goes outside of his line of duty and assaults him; and that this doctrine rests upon the obligation of the carrier, not only to carry his passengers safely, but to protect them from ill treatment by other passengers, intruders, or employes. This is the general rule: *East Tenn. V. & G. Ry. Co. v. Flectwood*, (Ga.), 15 S. E. Rep. 778; *Indianapolis Union Ry. Co. v. Cooper*, (Ind.), 33 N. E. Rep. 219; *Citizens' St. Ry. Co. of Indianapolis v. Willoby*, (Ind.), 33 N. E. Rep. 627; *Harrold v. Winona & St. Peter R. R.*, 47 Minn. 17; S. C., 49 N. W. Rep. 389; *Galveston, H. & S. A. Ry. Co. v. McMonigal*, (Tex.), 25 S. W.

Rep. 341; but the carrier is not liable if the servant was exposed to provocation sufficient to justify the assault, or acted in self defence, under a reasonable apprehension of immediate danger: *New Orleans & Northeastern R. R. Co. v. Jones*, 142 U. S. 18; S. C., 12 Sup. Ct. Rep. 109.

The English Chancery Division has lately decided, in *All v. Lord Stratheden*, [1894] 3 Ch. 265, that a gift by will for the benefit of a volunteer corps is a charitable bequest; and that a bequest of an annuity to be provided to a volunteer corps on the appointment of the next lieutenant-colonel, is void as a transgression of the rule against perpetuities, since such an officer may never be appointed.

The Supreme Court of Pennsylvania, in the recent case of *Wick China Co. v. Brown*, 30 Atl. Rep. 261, ruled, that a preliminary injunction, rightfully granted against members of a labor union, alleged to have combined and conspired to prevent the plaintiff from employing other workmen in its factory, should not have been dissolved, when the answer, signed by twenty-one of the defendants, is not sworn to, though affidavits, made by nearly all the defendants, deny certain acts of violence charged in the bill. The order dissolving the preliminary injunction was reversed and set aside, and the injunction reinstated and continued.

The Supreme Court of Nebraska has recently passed upon a new question of law, in *Pope v. Benster*, 60 N. W. Rep. 561, holding that there was no reason why real estate should not be made the subject of a suit in the nature of conversion, by analogy to personal property; and that therefore (1) When the owner of a judgment, which to his knowledge has been paid, but never satisfied of record, and which remains an apparent lien on real estate of another, causes execution to be issued on that judgment, the real estate on which it is an apparent lien to be levied on and sold, such sale to be confirmed, and a conveyance therefor to be executed and delivered to the purchaser at the execution sale, and

accepts the proceeds of that sale, the owner of the real estate so sold may treat the sale as void and recover the land; or, at his election, he may waive the invalidity of the sale, and sue the owner of the judgment for the value of the real estate; (2) The measure of damages in such a case is the fair market value of the interest of the owner in the real estate at the time of its sale on execution; (3) In such an action, the owner of the judgment is estopped from asserting, as a defence, that the execution sale, and the subsequent proceedings, were void.

According to the Supreme Court of Nebraska, a Board of Health may be authorized by statute to make rules for the disinfection of the baggage of persons coming from a country where contagious disease exists, and making it a misdemeanor for any person to refuse to permit his baggage to be disinfected, and such rules are therefore not unconstitutional; but such a statute does not authorize a rule to subject the baggage of *all* immigrants to disinfection, irrespective of the locality from which they come: *Hurst v. Warner*, 60 N. W. Rep. 440.

The Supreme Court of Nebraska holds that a contract for the removal of dead animals, garbage and other noxious and unwholesome matter, from cities, though conferring exclusive privileges upon the contractor, is not unconstitutional, as contravening a provision of the constitution that "the legislature shall not pass any special or local laws . . . granting to any corporation, association or individual, any special or exclusive privileges, immunity or franchise whatever:" *Smiley v. MacDonald*, 60 N. W. Rep. 355.

In the opinion of the Court of Appeals of New York, when the president of a corporation ratifies for the benefit of the corporation a contract made by him while acting as a promoter thereof, for services to be rendered to the corporation, and such services are performed for the corporation, and the contract providing therefor is one which would have bound the corporation, if made by the presi-

dent after it had acquired a legal existence, the corporation is bound by the contract: *Oakes v. Catarangus Water Co.*, 38 N. E. Rep. 461.

The Court of Appeals of Colorado has recently decided, that when, by statute or charter, the power of electing the president of a corporation is vested in the board of directors, an election of a president by the stockholders at their annual meeting is a nullity, and confers no title to the office: *Walsenburg Water Co. v. Moore*, 38 Pac. Rep. 60.

The English Chancery Division has recently passed upon a very interesting point of parliamentary practice, in *Natl. Dwel-
lings Soc. v. Sykes*, [1894] 3 Ch. 159, in which case it was held, that it is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but that he has no power to stop or adjourn a meeting at his own will; and if he attempts to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that purpose.

The same court has ruled, that the withdrawal of an application for shares in a corporation may be made orally at any time before notice of allotment is given; and that, in the absence of evidence to the contrary, the court will presume that a clerk in the registered office of a corporation, is, during business hours, and while the secretary is absent, so far in charge of the office, that he has authority to receive a notice, so as to make it a communication to the corporation: *In re Brewery Assets Corporation*, [1894] 3 Ch. 272.

In the opinion of the Supreme Court of Iowa, the fact that, pending a suit to subject land to the payment of a judgment, the judgment is satisfied of record, does not deprive the court of further jurisdiction, so as to render a decree of sale void: *Oliver v. Riley*, 60 N. W. Rep. 180.

The last mentioned court has also lately decided, that when a contract of shipment by rail does not define what shall constitute a carload, a general custom among Custom and Usage railroad men and shippers, by which a carload is made to consist of a certain number of pounds, governs the contract: *Good v. Chic., R. I. & P. Ry. Co.*, 60 N. W. Rep. 631.

The Supreme Court of Indiana holds that a deed of land, given by one not judicially declared insane, cannot, during his lifetime, be avoided on the ground of insanity, by Deeds one to whom, under the provisions of a will, the land would descend, if not disposed of by the grantor in the deed during his lifetime: *McMillan v. Deering*, 38 N. E. Rep. 398.

The Chancery Division has recently reasserted the doctrine, that if it can be gathered from the words used by the testator, that he intended to give a particular property to Devise a legatee, but owing to the testator having several properties answering the description in the will, it is impossible to say, either from the will itself, or from extrinsic evidence, which of these several properties the testator referred to, the gift fails for uncertainty, and the court cannot, to avoid intestacy, construe the will as giving the legatee the option of electing which property he will take: *Asten v. Asten*, [1894] 3 Ch. 260.

According to the Supreme Court of Michigan, money paid by a mortgagee, in excess of the amount due on Duress the mortgage, to stop foreclosure proceedings, is a voluntary payment, and cannot be recovered on the ground of duress: *Verreycken v. Vandenhoot*, 60 N. W. Rep. 687.

The Supreme Judicial Court of Massachusetts has lately held, in *Shanghnessy v. Leary*, 38 N. E. Rep. 197, that when a person has adversely used a wooden drain across Easements another's land, the laying of an earthen pipe inside the wooden drain does not interrupt the running of the

statute of limitations in favor of the easement therein, for a greater or more burdensome use of the drain does not make it a different drain, or destroy the character of such use as is continuous; and, as a matter of law, the fact that the earthen pipe was laid at the joint expense of the owners of the servient and the dominant tenements does not prevent the use of it by the latter from being adverse. Nor, according to the same court, does an enlargement of a drain at the joint expense of the owners of the servient and dominant tenements, destroy the identity of the drain so as to destroy the easement: *Jones v. Adams*, 38 N. E. Rep. 437.

The Supreme Court of Michigan very properly holds, that voters may rely upon the regularity of the ballots prepared by the proper officers; and that it does not matter that a person whose name is printed on the ballot was not the nominee of any party, and that his name was not properly certified, and not entitled to a place on the ballot; if elected, he is entitled to the office: *Bragdon v. Navarre*, 60 N. W. Rep. 277. This, of course, supposes that no fraud was intended or practiced by the officers who prepared the ballots; if such was the case, the above decision would hardly apply.

The Supreme Court of New York is of opinion, that a statute, providing that the inhabitants of a town may have their polling place in a city created within the limits of the town, is constitutional: *Pro v. Carson*, 30 N. Y. Suppl., 817.

The Supreme Court of Minnesota has just rendered an important decision under the Australian Ballot Law, in *State v. Bralcy*, 60 N. W. Rep. 676, to the effect that the requirement of the statute that an oath must be administered to an alleged illiterate or physically disabled voter before he can have the aid of another person in marking his ballot, is mandatory; and the voter who requests such aid must, under oath, bring himself strictly within the terms of the statute as to his inability to mark his own ballot. He cannot avail himself of aid on the ground that glasses, but has not brought them with him.

held by the Supreme Court of Michigan, a few months earlier, in *Ellis v. Reynolds*, 58 N. W. Rep., 483, with the further ruling, that if the voter does not make the oath required, though he is in fact within the terms of the act as to disability, his vote should not be counted, though no fraud is intended. The Pennsylvania Ballot Law is weak, in not requiring oath as to disability; yet it has been held that even under it, officers of election might, and should, in case of doubt, examine the voter on oath as to his good faith in alleging his disability: *In re Election Instructions*, 2 D. R. (Pa.) 1. But in another case, in the same state, *In re Beaver Co. Elections*, 12 Pa. C. C. R. 227, it was ruled, that the voter was the sole judge of his disability. Locality may have had something to do with this difference of opinion, the latter decision coming from the vicinity of Senator Quay's home. It was also held, in the former of these Pennsylvania cases, that the act only contemplated actual physical disability, such as blindness, paralysis, infirmity or decrepitude, inability to read, etc., and did not include drunkenness, or ignorance of the proper method of marking, due to neglect by the voter to inform himself on that point. The general practice of election boards in Pennsylvania, however, is to allow the voter assistance on his mere request.

The Court of Appeals of New York has recently decided, in accord with the best authority, that the occupation of a rural highway, the fee of which belongs to the eminent domain abutting owners, by a telegraph company, for the erection of its poles, is an additional burden to the easement for a highway, for which the owners of the fee are entitled to compensation: *Ecls v. Am. Telephone & Telegraph Co.*, 38 N. E. Rep. 202; affirming *Ecls v. Am. Tel. & Tel. Co.*, 65 Hun. 516; S. C., 20 N. Y. Suppl. 600. To the same effect are *Blashfield v. Empire State Telephone & Telegraph Co.*, 18 N. Y. Suppl. 250; S. C., 24 N. Y. Suppl. 1006; 71 Hun. 532; *Chesapeake & Potomac Telephone Co. v. Mackenzie*, 74 Ind. 36. Other courts, however, have held a contrary doctrine: *Pierce v. Drew*, 136 Mass. 79; *Julia Building Assn. v. Bell Tel. Co.*

38 Mo. 258. The most recent case to this effect is *Brown v. Eaton*, (Mich.), 59 N. W. Rep. 145, in which the court declared that it was difficult to see any distinction between the use of a highway for electric railway poles and for poles erected for the use of a telegraph or telephone company; in wilful ignorance of the manifest distinction that the former is a use for travel, the latter not. Such arguments are their own best refutation.

The District Court for the Northern District of California, after reviewing the authorities, has wisely concluded, in *In re Storrer*, 63 Fed. Rep. 564, that telegraph messages, in the hands of a telegraph company, are not privileged communications, so far as the company is concerned, and their production will be compelled by *subpoena duces tecum*, in aid of an investigation by a grand jury of supposed criminal acts of the senders and receivers of messages, with which the company and its officers are not in any way concerned.

According to the Court of Appeals of Kentucky, a person, who by his "conduct" falsely represents himself as the agent of a railroad company, and procures money from another on the strength of employment which he promises him, obtains the money by a "false pretence, statement or token," under Gen. Stat. Ky., c. 29, art. 13, § 2: *Comm. v. Murphy*, 27 S. W. Rep. 859.

The Supreme Court of Louisiana has lately given one of those decisions, based on the technical rules of the old common law, that are apt to afford more comfort than discouragement to the criminal classes, by holding, in *State v. Taylor*, 16 So. Rep. 190, that where the defendant has signed the name of a number of drawers to a note, and signs an addendum to the note, stating that he is their authorized agent, he cannot be convicted of forgery, as an apparent agent cannot be convicted of that crime, though he has no authority in fact; and the falsehood lies not so much in the forgery of the instrument, as in the false assumption of

authority as agent. But the expression of the court that the defendant was not guilty of making the instrument, and therefore not within the definition of a forger, leads one to suspect that they confounded the meaning of the word "making," as used in the definition of forgery, with its much narrower meaning as applied to a promissory note. At any rate, the doctrine needs a legislative reproof.

The Supreme Court of Iowa, in *Ward v. Purdy*, 60 N. W. Rep. 526, holds that a voluntary conveyance to the wife and children of the grantor is not fraudulent as against existing creditors, though not recorded, when the grantor is solvent at the time, and the deed is made by him in view of possible injury to his business of liquor selling from prohibitory legislation then pending, provided that enough property is retained by him to pay existing debts. *Quere*, as to the effect of such a conveyance as against subsequent creditors. The Supreme Court of Indiana maintains the same general doctrine, in *Emerson v. Opp*, 38 N. E. Rep. 330. The latter court, however, also holds, that the mere joinder by the wife, for the purpose of conveying her inchoate interest, in a conveyance, fraudulent as against creditors, of real property of the husband, through a trustee, to himself and his wife, to hold by entireties, does not form such a consideration as will support the conveyance; and the wife who so joins is affected by the fraud of the husband, whether she had knowledge of it or not: *Phillips v. Kennedy*, 38 N. E. Rep. 410.

The Court of Appeals of Kentucky has lately ruled, in *J. G. Mattingly Co. v. Mattingly*, 27 S. W. Rep. 985, that when one purchases the goodwill and firm name of a business, he is entitled to receive letters and telegrams addressed to that firm name, and to the advantage resulting from business transactions proposed in them by the customers of the old firm.

The Common Pleas of New York City and County, in

Banzer v. Banzer, 30 N. Y. Suppl. 803, has held, that an estate by entireties can only be created by a conveyance to husband and wife, and that, therefore, a conveyance to the wife by the husband's co-tenant will not create such an estate.

In the opinion of the Court of Appeals of Kentucky, since the passage of the married women's acts, enabling a married woman to contract with third persons as if she were sole, a wife may form a partnership with her husband, so as to bind her property for the payment of partnership debts to strangers: *Louisville & N. R. Co. v. Alexander*, 27 S. W. Rep. 981.

There is a very decided conflict of opinion on this latter subject; but the mass of authority, if not the weight, seems to be against the view of the Kentucky court. That view has been accepted in Michigan, *Vail v. Winterstein*, 94 Mich. 230; S. C., 53 N. W. Rep. 932, and in Vermont, *Lane v. Bishop*, 65 Vt. 375; S. C., 27 Atl. Rep. 499, but rejected in Arkansas, *Gilkinson-Sloss Co. v. Salinger*, 19 S. W. Rep. 747; in New York, *Kaufman v. Schoeffel*, 37 Hun, 140; *Lowenstein v. Salinger*, 17 N. Y. Suppl. 70; in South Carolina, *Weisiger v. Wood*, 36 S. Car. 424; S. C., 15 S. E. Rep. 597, and in Washington, *Board of Trade of Seattle v. Hayden*, 30 Pac. Rep. 87. In one recent case, in South Carolina, *Vannerson v. Cheatham*, 19 S. E. Rep. 614, the court claimed that entering into a contract of partnership would be a contravention of the statutory prohibition against becoming liable to answer for the liability of another; but this is absurd, as the liability of a firm is that of each of the members individually, not that of each for the others. There seems to be no good reason why a wife should not become partner in a firm, either with her husband, or with any one else. At any rate, no valid objections have as yet been urged against it.

The right to take and use the ice on streams and ponds seems to be a matter that is never settled. It is a most curious phenomenon, that one of the earliest decisions on the subject, one that has been

deservedly hooted at, *Mill River Mfg. Co. v. Smith*, 34 Conn. 462, should have received two adherents within the last year, and one of them, apparently, entirely independent in its origin. In *Eidemiller Ice Co. v. Guthrie*, 60 N. W. Rep. 717, the Supreme Court of Nebraska ruled, (1) That the owner of a mill, who has the right to maintain a pond, or flow back the water of a stream on the land of another, and to use such water to operate his mill, possesses, as to the water, the dominant right, and while not the actual owner of the ice which forms on the pond, is entitled to have it remain there during the time, and whenever, its so remaining will be or is useful and necessary to the legitimate exercise of his right to use the water as motive power for the mill, or to successfully operate the mill; but the owner of the land, if upon a navigable stream, may make any use he desires of the ice which forms over and above so much of the bed of the stream to which his ownership extends, as does not interfere with or injure the rights of the mill owner; (2) That if the owner of the mill and dam subservient thereto wantonly and unnecessarily draws water from, or lowers the water in the pond, and by so doing injures or destroys the ice privileges of the owner of the land bordering on the pond, he thereby renders himself liable in damages to the riparian owner; but the damage is not irreparable, and an injunction will not lie to restrain him from so drawing off the water. The Supreme Court of Connecticut, following its former decision, held some time ago, in *Howe v. Andrews*, 62 Conn. 398; S. C., 26 Atl. Rep. 394, with which the first part of the decision above is in harmony, that the riparian owner can not cut the ice on a mill pond, when its removal will cause an injury to the right of the mill owner. No better comment can be made on this doctrine than the language of the court in *Brookville & Metamora Hydraulic Co. v. Butler*, 91 Ind. 134; S. C., 46 Am. Rep. 581, and *Cummings v. Barrett*, 10 Cush., (Mass.), 186. There is an annotation on the general subject of property in ice, in 32 AM. L. REG. 166.

In the opinion of the Supreme Court of North Carolina,

a license tax imposed on "every itinerant who puts up lighting rods," imposes no burden on interstate commerce, as the sale and delivery of the articles are separable from the erection of the same; and the original packages must of necessity be broken before the articles are put up: *State v. Gorham*, 20 S. E. Rep. 179.

Interstate
Commerce,
License

The Supreme Court of Appeals of Virginia, also, maintains that a statute, which allows the receiver of a telegram to recover a penalty from the telegraph company for failure to deliver the telegram as soon as practicable, is not in conflict with the interstate commerce clause of the constitution: *Western Union Tel. Co. v. Bright*, 20 S. E. Rep. 146. The telegram in this case was a domestic one, and therefore within the rule laid down last year by the Supreme Court of the United States, in *Postal Telegraph Co. v. Charleston*, 153 U. S. 692; S. C., 14 Sup. Ct. Rep. 1094, which held that a license tax imposed on such telegrams was valid. But the Virginia Court went a step further, and, though *obiter*, reasserted the doctrine already declared by it in *Western Union Tel. Co. v. Tyler*, 18 S. E. Rep. 280, that the penalty could be recovered for failure to deliver a telegram from another state, at least in the absence of conflicting legislation by Congress.

Penalty

The Supreme Court of California holds, as no one should have been foolish enough to question, that a judge, who, by marriage, is first cousin, or cousin-german, of a stockholder in a corporation, is not thereby disqualified to hear a case in which the corporation is interested: *Robinson v. So. Pac. Ry. Co.*, 30 Pac. Rep. 94. If the contention in the case were sound, it would apply with ten-fold force to the case of a judge who is himself a stockholder in a corporation; and yet these sit almost every day, and no one questions their qualification. It may and safely be taken as the general rule, that none but a direct interest in the subject matter is now sufficient to disqualify a judge. See 1 AM. L. REG. AND REV. (N. S.) 817.

Judge,
Disqualifica-
tion

The Supreme Court of South Dakota has recently decided

a very interesting point of law, in *Brettell v. Deffebach*, 60 N.

Judgments W. Rep. 167, in which case it held that though,

as a general rule, none but parties to a judgment can have it set aside, a real party in interest, who is the only one prejudiced by a judgment rendered by default in an action to which he was not made a party, has a standing in court that entitles him to move to have that judgment vacated, on the ground that there was no service of summons sufficient to give the court jurisdiction of the persons of the nominal defendants, and that the case was not prosecuted with reasonable diligence.

The facts of this case were peculiar. The applicant for relief purchased the real estate affected by the judgment, of the parties defendant, in 1882, and took title in 1887, on a certificate of the clerk of the circuit court that no suits were then pending against them, but this was in fact pending, having been begun in 1880, though no steps had been taken since that time. In 1889, judgment was entered against the vendors by default, which, under the laws of that state, bound the land in the hands of the purchaser.

In *Vallery v. State*, 60 N. W. Rep. 347, the Supreme Court of Nebraska has ruled that it is no defence to a criminal

Libel prosecution for libel that the writing complained of was a repetition of previous oral publications, and that the defendant was induced to make the written publication by the acts of the person concerning whom the libel was published.

The Supreme Court of Pennsylvania, in *Patterson v. Graham*, 30 Atl. Rep. 247, has announced the very reasonable rule, that when the purchaser of growing trees for the

Licenses purpose of manufacture enters on the land within a reasonable time, and cuts all the timber apparently worth taking, and thereupon removes his mill, and abandons the premises for eleven years, his right to enter and cut timber is gone.

According to the Supreme Court of Iowa, a statement in a

letter to the writer's creditor, in regard to a certain note, that
 "you know that I will pay what I can, and what
 is right," is not a sufficient admission of liability
 to remove the bar of the statute of limitations: *Nelson v. Hanson*, 60 N. W. Rep. 655.

The Circuit Court of Appeals of the Seventh Circuit, in *MacDonald v. U. S.*, 63 Fed. Rep. 426, has held, that when
 the value of bonds in an investment company
 depends on their numbering, and the numbering
 is done by the secretary of the company, according to the
 order in which the applications happen to reach him, the
 result of the purchase of such bonds is so dependent on
 chance, as to render their sale a lottery.

The Supreme Court of Iowa has lately ruled, that when a
 person institutes a criminal prosecution, with full knowledge
 of all the material facts, and of their insufficiency
 to support the charge, the facts that the accused
 waived a preliminary hearing, that he was indicted, and that
 the jury disagreed on the trial, are no defence to an action for
 malicious prosecution, though the person who prosecutes did
 not appear before the grand jury, nor give false testimony on
 the trial: *Barber v. Scott*, 60 N. W. Rep. 497.

The Circuit Court of Appeals of the Seventh Circuit has
 rendered a most interesting and important decision, in *Arthur*
v. Oaks, 63 Fed. Rep. 310, on appeal from the
 famous order of Judge Jenkins, in *Farmers' Loan*
& Trust Co. v. N. Pac. Ry. Co., 60 Fed. Rep. 803, which
 called down on that unhappy gentleman's head the woes of
 a CONGRESSIONAL INVESTIGATION. Justice Harlan,
 in delivering the opinion of the court, reviews the ground very
 carefully, and concludes that the court below erred in grant-
 ing the clause of the injunction, restraining the employes of
 the road from "so quitting the service of the said receivers,
 with or without notice, as to cripple the property or prevent or
 hinder the operation of the said railroad," on the ground that
 it would be an invasion of one's natural liberty to compel him

to work for, or to remain in the personal service of another. One who is placed under such restraint is in a condition of involuntary servitude. The rule is, without exception, that equity will not compel the actual affirmative performance by an employé of merely personal services, any more than it will compel an employer to retain, in his personal service, any one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employé, engaged to perform personal service, to quit that service, rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting, in the one case, or the discharging, in the other, is in violation of the contract between the parties, the one injured by the breach has his action for damages, and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day, or the affirmative acceptance, of merely personal services. Relief of that character has always been regarded as impracticable. In the case of a railroad, the injury and inconvenience to the public that may result from simultaneous cessation of work by any considerable number of employés should be remedied by legislation.

This, however, studiously ignores the fact that the remedy by action for damages for breach of contract is wholly inadequate, and that the position of the railroad employé is *quasi*-public, and his services not of a "merely personal" nature. A public officer may be compelled to perform the duties of his office by mandamus; and equity can certainly enjoin him from refusing to perform those duties. The failure of the court to pass upon these questions robs the decision of much of its weight.

But even as it stands, it is by no means the victory for labor that it has been boasted to be, and as the worthy gentlemen who composed the Strike Commission, in their fatherly solicitude for the poor workingmen, seem to have understood it to be, judging from the reference to it in their report. Justice Harlan admits that while individual cessation of work cannot be restrained, a combination or conspiracy to procure

an employé or body of employés to quit service in violation of their contract of service, would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law; and that, accordingly, the clause of the injunction granted, restraining the employés "from combining and conspiring to quit, with or without notice, the service of said railroad, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad," was good. See 1 AM. L. REG. & REV. (N. S.) 609.

Mechanics' liens are always a fruitful source of litigation; and the reports are usually plentifully seasoned with cases on that subject. The present month is no exception.

Mechanics' Liens The Supreme Court of Michigan, in *Davis & Rankin Bldg. & Mfg. Co. v. Murray*, 60 N. W. Rep. 437, has recently decided, that when a number of subscribers to the stock of a creamery company contract for the erection of a building, but the contract of subscription creates only a several liability, a mechanics' lien cannot be enforced on the joint property for the non-payment of the contract price; and the Supreme Court of Kansas has held, that a lien for materials furnished for the erection of improvements on land in one state, may be maintained when the contract for the materials was entered into in another: *United States Inv. Co. v. Phelps & Bigelow Windmill Co.*, 37 Pac. Rep. 982.

According to the Supreme Court of South Dakota, in the absence of an express agreement, or anything indicating an intention to the contrary, a mechanic or material-
Waiver man does not waive his right to file and enforce a lien, by merely accepting, for the amount of his claim, the promissory note of the owner, at his instance and request, and for the sole purpose of suspending his right to foreclose such lien for sixty days, at which time the note, according to its terms, matures: *Hill v. Alliance Bridge Co.*, 60 N. W. Rep. 752.

This is in accord with the general rule on the subject, that the mere taking of collateral security will not amount to

a waiver of the right to a lien, unless there is an express understanding to that effect, or it can be implied from the acts of the parties: *Hoagland v. Lusk*, (Neb.), 50 N. W. Rep. 162. Payment is, of course, a bar to a lien, and the acceptance of a note as payment, whether it be that of the owner or of a third person, will be a waiver of the right to file a lien: *Smith v. Parsons*, 37 Neb. 677; S. C., 56 N. W. Rep. 326. So, too, the fact that the creditor discounted the note affords a strong presumption that he accepted it as payment of the debt, and will amount to a waiver, where it is not in his possession or control at the time of suing out the lien: *McDuffee v. Rra*, 13 Pa. C. C. R. 261. But the lien is not waived, if the circumstances attendant upon the taking of the note are not inconsistent with its retention: *Kilpatrick v. Kansas City & B. R. R.*, (Neb.), 57 N. W. Rep. 644; *Jones v. Moores*, 67 Hun. 109; S. C., 22 N. Y. Suppl. 53; and the fact that, after the note was negotiated, the creditor redeemed it, and surrendered it, will show an intention to preserve the right to the lien: *Davis v. Parsons*, 157 Mass. 584; S. C., 32 N. E. Rep. 1117. The taking of a note as collateral security merely suspends the enforcement of the lien until the note is payable: *Keogh Mfg. Co. v. Eisenberg*, 27 N. Y. Suppl. 356. But it has been held in Canada, that when the lien is thus suspended during the currency of a note, it is absolutely gone; *Edmonds v. Tierman*, 21 Can. S. C. R. 406.

The Irish Chancery Division, in *Riddulph's Estate*, [1894] 1 I. R. 488, has recently decided, that an agreement by B.

with A., as follows: "In consideration of the advances this day made by you, I hereby agree

that in case I fail to pay you any promissory note or bill of exchange of mine when due, I shall, upon demand, execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums of money advanced, or to be advanced, by you to me, on my promissory notes, or bills of exchange, with interest, till paid, at such rate as may, in each case, be provided by such promissory notes or bills of exchange," creates, without any demand, a valid equitable mortgage on

lands, the property of B. at the time of the agreement, for the amount of notes or bills unpaid at maturity; the words, "on demand," having reference to the execution of a legal mortgage.

The Supreme Court of Louisiana has again asserted the rule, that the power vested in a municipal corporation by the legislature, to make by-laws for its own government and the regulation of its police, includes the power to punish violations of its ordinances, though the offence, (c. g., carrying concealed deadly weapons,) is also denounced by state law: *Board of Police of Opelousas v. Giron*, 16 So. Rep. 190. See 1 AM. L. REG. & REV. (N. S.) 669.

The Supreme Court of Nebraska, in *Foley v. State*, 60 N. W. Rep. 574, while acknowledging the general rule to be, that the courts will not take judicial notice of municipal ordinances unless required so to do by special charter or general law, very wisely rejected the weight of authority, and held that an exception to that rule should be recognized, in favor of courts of municipal corporations, which will take notice of ordinances of their own municipalities, since they stand in the same relation to those ordinances as courts of general jurisdiction to the general laws of the state; and that, therefore, such ordinances need not be set out in an information preferred in a municipal court.

This, however, must be understood to apply only to purely municipal courts of limited jurisdiction, and not to courts of general jurisdiction, which may happen to be located within the bounds of the municipality.

According to a recent decision of the Supreme Court of Wisconsin, when a telephone company negligently leaves a wire connecting plaintiff's building with another, and a pole on the latter is struck by lightning, which is conducted along the wire to plaintiff's building, and sets it on fire, so that it is burned, the company cannot claim that the lightning was the act of God, as by its negligent act

it so arranged that the stroke could destroy plaintiff's building: *Jackson v. Wis. Tel. Co.*, 60 N. W. Rep. 430.

Among the many subdivisions of the general subject of negligence, that of imputed negligence is fast becoming one of the most prominent. Several decisions on this point have been published during the past month.

Imputed Negligence, Husband and Wife The Supreme Court of Indiana has decided, that the negligence of a husband, driving his wife over a railroad crossing, where she is injured, cannot be imputed to her, so as to bar her recovery: *Lake Shore & M. S. Ry. Co. v. McIntosh*, 38 N. E. Rep. 476. To the same effect are *Louisville, New Alb. & Chic. Ry. Co. v. Creek*, 130 Ind. 139; S. C., 29 N. E. Rep. 481; *Chic., St. L. & Pitts. Ry. Co. v. Spilker*, 134 Ind. 380; S. C., 33 N. E. Rep. 280, rehearing denied, 34 N. E. Rep. 218. But the negligence of the husband has been imputed to the wife, who remained seated in the carriage at a railroad station, while he held the horse, "because she was in his care:" *Toledo, St. L. & Kansas City Ry. Co. v. Crittenden*, 42 Ill. App. 469. As if the understanding between the parties could relieve the railroad company from liability for its own negligence!

The Court of Civil Appeals of Texas has recently passed upon two cases on the question of the imputation of the negli-

Parent and Child gence of a parent to a child, and in both cases held the negative. In *Houston City Ry. Co. v. Rickart*, 27 S. W. Rep. 918, it ruled, that when a father and minor son, both members of the city fire department, are both injured by the overturning of a hose cart, driven by the father, caused by the defective construction of a street railway track at a street crossing, the negligence of the father, if any, cannot be imputed to the son; and in *Allen v. Tex. & Pac. Ry. Co.*, 27 S. W. Rep. 943, that in an action by a child, through its father as next friend, against a railroad company, for personal injury, the negligence of the father, in whose care the child was travelling, cannot be imputed to the latter. These are the more remarkable, as the same court, in *Jackson v. Gulf, C. & S. F. Ry. Co.*, 21 S. W. Rep. 274, held that the negligence of the father was to be imputed to a blind son, of age of dis-

cretion, who was unable to take care of himself, and, of his own volition, entrusted his safety to his father. Similarly, the negligence of the mother is not to be imputed to a child: *Tex. & Pac. Ry. Co. v. Fletcher*, (Tex.), 26 S. W. Rep. 446. See *Murphysboro v. Woolsey*, 47 Ill. App. 447; *St. L., I. M. & S. Ry. Co. v. Rexroad*, (Ark.), 26 S. W. Rep. 1037.

The negligence of the driver of a vehicle, with whom the person injured is riding at his invitation, and over whom he has no control, is not to be imputed to the latter: *Al. & V. Ry. Co. v. Davis*, 69 Miss. 444; S. C., 13 So. Rep. 693; *B. & O. R. R. v. State*, (Md.), 29 Atl. Rep. 518; *contra*, *Whittaker v. City of Helena*, (Mont.), 35 Pac. Rep. 904. The negligence of the driver of a street car is not to be imputed to a passenger: *Little Rock & M. R. Co. v. Harrell*, 58 Ark. 454; S. C., 25 S. W. Rep. 117. And the negligence of a wife, which caused her injury, is not imputed to the husband, so as to bar his recovery for those causes of injury peculiar to himself, such as the loss of her society and aid in household affairs, and medical expenses: *Honey v. C., B. & Q. Ry. Co.*, 59 Fed. Rep. 423. But the negligence of a nurse, in charge of a child, will be imputed to its parents, so as to bar a recovery by them for its death: *Schlenks v. Central Pass. Ry. Co.*, (Ky.), 23 S. W. Rep. 589. And the negligence of a gripman, under the control of the conductor of a car, will be imputed to the latter, so as to bar his recovery from a third person, whose acts contributed to the injury: *Minster v. Cincinnati Ry. Co.*, 53 Mo. App. 276.

There is a full annotation on this subject in 32 AM. L. REG. 763.

In the opinion of the Court of Appeals of New York, when an instrument is in all other respects a negotiable promis-

**Negotiable
Instrument** sory note of a corporation, the fact that a seal is affixed thereto, purporting to be the seal of the corporation, but unaccompanied by any recital or act showing that the officers of the corporation intended, or, in fact, did affix it, does not destroy its negotiability: *Wicks v. Esler*, 38 N. E. Rep. 377.

The Chancery Division, in *Lambton v. Mclish*, [1894] 3 Ch. 163, has lately applied the principle that the acts of two or more persons may, taken together, constitute such a nuisance that the court will restrain all from doing the acts constituting the nuisance, although the annoyance occasioned by the act of any one of them, if taken alone, would not be a nuisance, to the case of two proprietors of merry-go-rounds, who used organs as an accompaniment to their amusement; and enjoined them both.

The Supreme Court of Iowa has reasserted the somewhat harsh doctrine, that a parent is liable for necessities furnished to a minor son, while living away from home with her consent, though the son was able to work, and controlled his own earnings: *Cooper v. MacNamara*, 60 N. W. Rep. 522.

The same court has also held, that it is within the scope of the partnership business to borrow money to pay the firm debts: *Burtner v. Strinbrecker*, 60 N. W. Rep. 177; and that one who loans money to a member of a mercantile firm, and receives from him a note, executed in the name of the firm, has a right to presume that the note was made in the course of the partnership business: *Flatt v. Kochler*, 60 N. W. Rep. 178.

The Supreme Court of Nebraska, while admitting that it seems to be the better opinion that the plaintiff, in an action for personal injuries, may be compelled to submit to a personal examination, is of opinion that a judge of the district court has no jurisdiction, at chambers, outside of the county in which the cause is pending, to make an order requiring the plaintiff to submit his body to such an examination by a board of physicians, appointed by the judge for that purpose: *Ellsworth v. Fairbury*, 60 N. W. Rep. 336. There is an excellent annotation on the right to enforce personal examination, in 32 AM. L. REG. 550.

The same court holds, that on a trial by the court without a jury, it is not reversible error to deny the party holding the affirmative of the issue the right to open and close the argument, when it is not apparent from the record that he has been prejudiced thereby: *Citizens' State Bank v. Baird*, 60 N. W. Rep. 551.

According to the Supreme Court of Florida, an affidavit by the defendant in a criminal case for a continuance on account of the absence of witnesses, should allege that they are absent without the consent of the defendant, either directly or indirectly given: *Bryant v. State*, 16 So. Rep. 177.

It has recently been decided by the Supreme Court of Wisconsin, in *State v. Evans*, 60 N. W. Rep. 433, that prohibition will not lie to restrain a magistrate from proceeding in a criminal cause, because the warrant was void, since the legal remedy is adequate, nor on the ground that the accused has been once in jeopardy. It is not the province of the writ of prohibition to supply the place of a writ of error.

The Court of Appeals of Kentucky has lately ruled, that when a railroad company allows two passenger cars to remain on a side track, near the depot and along a public street, the doors being open, it is negligence to back other cars against them for the purpose of coupling, without seeking to ascertain whether there are any persons in such cars, though no one had a right to be therein; and if the company neglects its duty in this respect, it will be liable to a boy injured thereby: *Louisville & N. Ry. Co. v. Popp*, 27 S. W. Rep. 992. And the Court of Civil Appeals of Texas holds, that a railroad company is liable for injury to mind and body caused by nervous shock and fright, due to the negligent running of cars off a switch into plaintiff's yard, and within a few feet of her house, though the plaintiff was not actually touched: *Yoakum v. Kroeger*, 27 S. W. Rep. 953.

The feud between the abstractor of titles and the county officials still continues, and the courts are from time to time obliged to define the limitations of their respective **Records, Inspection** rights *de novo*. In the latest case on this subject, *Barton v. Reynolds*, 60 N. W. Rep. 452, the Supreme Court of Michigan decided that no person has a right to keep a clerk continuously in the office of the county clerk, with free access to the files, for the purpose of making abstracts therefrom, except under such reasonable regulations as the county clerk may prescribe, and that the payment of a fee to provide additional office facilities was such a reasonable regulation. The same court, recently, in *Day v. Button*, 96 Mich. 600; S. C., 56 N. W. Rep. 3, ruled that an abstractor of titles could not use the office of a county officer to the exclusion of others, or annoy him by the presence of a large working force, or by work at unseasonable hours. See *West Jersey Title & Guarantee Co. v. Barber*, 49 N. J. Eq. 474, and an annotation on that case, in 31 AM. L. REG. 769.

The Supreme Court of Oregon recently held, in *Philomath College v. Wyatt*, 37 Pac. Rep. 1022, that the action of the **Religious Societies** highest ecclesiastical body of a religious sect, in adopting the report of a committee appointed to determine the validity of a constitutional amendment, and to submit it to the vote of its members, the amendment being adopted by the adoption of the report, is legislative, and therefore not binding as an adjudication upon the civil courts; and the Supreme Court of Nebraska has decided, in *Peterson v. Samuelson*, 60 N. W. Rep. 347, that when certain members of a church society had withdrawn therefrom and organized another society of the same church, and then returned to the society from which they had withdrawn, there is no presumption that by so withdrawing the seceders forfeited their membership in the church, as parts of which both societies existed, and on reunion the same society existed as had been originally organized.

According to the Supreme Court of Michigan, an action for

slander in regard to a business cannot be maintained by the husband of the owner thereof, though, in addition to his salary, he is entitled to a proportion of the profits, when he has no interest in the *corpus* of the business: *Child v. Emerson*, 60 N. W. Rep. 292. The Supreme Court of Louisiana is of opinion that an apothecary is not liable in damages to a physician, merely and only because he has on one or two occasions declined to fill his prescriptions, for reasons not at all impugning the physician's capacity; but that he is liable, if, without the slightest cause, he indulges in public expressions tending to create the impression of the physician's incompetency; as, for instance, that his diploma is not worth a straw: *Tartton v. Lagarde*, 16 So. Rep. 180. The same court has also very sensibly held, that when persons mutually engage in bandying opprobrious epithets, an action of slander for words thus uttered is not to be encouraged; and the interchange of such epithets, and mutual vituperation and abuse, will justify a judge in approving a verdict for the defendant, though the slanderous words are proved: *Goldberg v. Dobberton*, 16 So. Rep. 192.

The Supreme Court of Indiana, in *Stephenson v. Boody*, 38 N. E. Rep. 331, has recently decided, that when the Supreme Court overrules its former decisions, construing a statute, and gives it a new construction, contracts affected by that statute, and made while the former construction obtained, will be given the same effect, after the change in construction, as if no such change had been made.

The Supreme Court of Michigan holds, that when the maker of a note executes a chattel mortgage to a trustee to indemnify an indorser against liability thereon, a subsequent mortgagee is not entitled, on tender to the trustee of the amount due on the mortgage, to be subrogated to the rights of the holder of the note, as against the indorser: *Schmittziel v. Moore*, 60 N. W. Rep. 279.

In a recent case in the Appellate Court of Indiana, it was

ruled, that when a surety pays a judgment obtained against him and two co-sureties, one of whom is insolvent, *Sureties, Contribution* he may recover in equity from the solvent surety one-half of the amount so paid: *Newton v. Pence*, 38 N. E. Rep. 484. The same doctrine prevails in courts of law, wherever the distinctions between actions at law and in equity have been abolished, or equity powers have been conferred on common law courts: *Michael v. Allbright*, 126 Ind. 172; S. C., 25 N. E. Rep. 902; *Fanrot v. Gates*, 86 Wis. 569; S. C., 57 N. W. Rep. 294. But the share of the insolvent surety cannot be recovered from the others, when all the sureties have agreed among themselves to raise a common fund to pay the debt, some contributing more than their adequate share, and others less, but the former agree to release the latter from any further liability: *Cummings v. May*, 91 Ala. 233.

The Chancery Division has lately held, that when a testator gives all his property to trustees, upon certain trusts, and directs that certain specified sums of money should *Trusts* be invested for the benefit of his four sons on their attaining the age of twenty-one years, such sums to be applied as the trustees in their discretion may think fit; and further directs that the sums specified should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients; the sons are nevertheless absolutely entitled to the legacies, on attaining the specified age, freed from the exercise of any discretion on the part of the trustees: *In re Johnston*, [1894] 3 Ch. 204.

The same court, in *Noyes v. Paterson*, [1894] 3 Ch. 267, has ruled, that a person who has contracted to purchase land *Vendor and* is not entitled to repudiate his contract, merely because one link in the vendor's title consists of a voluntary conveyance to a person under whom the vendor claims by purchase for value.

According to a recent decision of the Supreme Court of

Missouri, a verdict cannot be impeached, solely on the affidavit of a juror that the time of imprisonment was
Verdict fixed by each juror writing on a piece of paper the number of years he was in favor of, and then dividing the sum by 12: *State v. Woods*, 27 S. W. Rep. 1114. It is high time that the courts abandoned this useless technicality, and permitted the evidence of such gross violation of duty, from whatever source, to have its proper weight; and not to cling to an absurd presumption in favor of the sanctity of a verdict, that is as unreasonable and as ill-founded as the maxim that "the king can do no wrong."

The Supreme Court of Iowa has just decided a very interesting and novel case, in which it held that no one of several
Waters persons, whose wells tap the same subterranean stream, can make an artificial use of the water therefrom, so as to entirely deprive the others at any time of the ability to make such use of it; that the use of water taken from such a well for city purposes is an artificial use, as is also its use by an individual for a bath-house; and that, therefore, the city cannot deprive the owner of the bath-house of the use of the water, without paying damages therefor: *Willis v. City of Perry*, 60 N. W. Rep. 727. It is also actionable to divert water from a stream, either surface or subterranean, by dams, wells or pumps, by which the flow of water is diminished, though such diversion is by the owner of land through which the stream flows or percolates, and on his own premises: *McClellan v. Hurdle*, 3 Colo. App. 430. But one is not prevented from lawful digging on his own land, though he thereby drains a spring on the land of another: *Elster v. Springfield*, 49 Ohio St. 82. This, however, seems questionable, and is a stretching of the *damnum absque injuria* doctrine to the very last point of tension. The distinction, if there be any, which seems doubtful, lies in the fact that in the actionable cases the act of the owner of the land is intended to interfere with the water, while in the non-actionable cases that interference is only an incidental consequence of an otherwise lawful act.

The Supreme Court of Missouri has recently laid down a very salutary rule, in *State v. Gresham*, 27 S. W. Rep. 1101, to the effect that when, after an order excluding ^{Witnesses,} ~~Separation~~ all witnesses from the court-room, defendant's witness, a co-defendant to whom a severance has been granted, remains seated by him during the trial, the court is justified in refusing to allow him to be examined, on the ground that the defendant connived at his disobedience.

A PROTEST AGAINST ADMINISTERING CRIMINAL LAW BY INJUNCTION.—THE DEBS' CASE.

By WILLIAM DRAPER LEWIS, Ph.D.

On the 14th inst. Eugene V. Debs, President of the American Railway Union, was sent to prison for six months, in the county jail in Chicago, by Judge WILLIAM A. WOODS, of the Federal Court, for contempt of an injunction. Other members of the Railway Union were given three months each. The injunction which, it is claimed, Debs disregarded was the celebrated omnibus injunction issued by the Federal Circuit Court last summer during the Pullman strike restraining all persons from interfering with the property and trains of certain railroads running out of Chicago. Judge WOODS said in his opinion, "If the injunction was, for any reason, totally invalid, no violation or disregard of it could constitute a punishable contempt; but, if the court acquired jurisdiction and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ." He maintains the court's right of jurisdiction to issue such an injunction by many quotations from English and American decisions. Those who desire to follow the principal cases should read the article on "Equity Jurisdiction as Applied to Crimes and Misdemeanors," by the late RICHARD C. McMURTRIE, Esq. It was, in some sense, the finest short article which that eminent jurist ever wrote (*AM. L. REG. & REV.*, vol. 31, p. 1). The editorial notes by the present writer in the same volume (p. 782) show the historical development of the law on the subject. It is not now intended to take up those decisions again. Suffice it to say here that the position of Judge WOODS is supported by several cases decided in other Federal Courts, and by an expression of Mr. Justice MILLER in the Supreme Court of the United States, as also by an English case decided by Vice-Chancellor MALINS. The principal case in the Federal Courts

is that of the *Carr D'Alene Consolidated Mining Co. v. Miners' Union of Wander et al.*, reported in 51 Fed. Rep. 260 (see AM. L. REG. & REV. 710). This case grew out of the trouble in the mining districts of Idaho. The striking miners were in possession of the mines, were preventing the new employes from working, and, indeed, had carried the new men over the borders of the Territory into Montana. The court granted an injunction, at the request of the company, restraining the members of the Union from further interfering with, threatening or molesting its employes or entering its works. There was no arrest or imprisonment as the result of any violation.

Another celebrated case in the District Courts is where Judge BREWER committed a man for contempt of court for interfering with the running of engines on a road which was in the hands of a receiver: *United States v. Kane*, 23 Fed. Rep. 748. The receivership, however, was made the main ground of the decision. The English case referred to is that of *Springhead Spinning Co. v. Riley*, Law Rep., 6 Eq. 551, where Vice-Chancellor MALINS issued an injunction restraining the members of the Union on a strike from placarding the town with posters asking workmen not to work for their old employers. This case has been made the basis of the principal American cases. The case in the Supreme Court of the United States was that of *Eilenbecken v. The District Court of Plymouth County*, reported in 139 U. S. 31. A statute of the State of Iowa declared that the selling of liquor was a nuisance, and that any citizen in the county where liquor was sold or thought to be sold, could apply for an injunction to restrain the alleged seller. The question of the contempt of this injunction was to be tried by the judge issuing the same on proof by affidavit of the fact of violation. One Eilenbecken, having been convicted in this way, the case was taken to the Supreme Court of the United States, the principal assignment of error being that the statute in question was void because, in effect, it deprived the plaintiffs, who were charged with selling liquor, "of the equal protection of the laws, and it prejudiced the rights and privileges of that particular class of persons, and denies to them the right of

trial by jury." The court held that the record did not show that the plaintiffs would have been denied the right of trial by jury had they demanded it. This view of the case, which was perhaps taken to avoid meeting the most serious question of constitutional law that had presented itself to the court for years, deprives the case of weight as an authority. Mr. Justice MILLER, however, went on to say, "We know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had." It was this expression which excited the ire of Mr. McMURTRIZ, and on which he based the article above referred to.

Apart from these decisions, let us examine for a moment what the real question involved in all these cases is, and the arguments which can be made on one side and the other. The question presented by the Debs' Case is shortly this: Can the fact that the crime with which the man is charged injured property and was a public nuisance, justify the court in depriving him of the right of trial by jury? The strongest argument in favor of the affirmative to this question is to be found in the facts of the Debs' Case. The court, before they issued the injunction, had ample evidence that a large body of persons in the community, some of whom had no connection with the railroads in and near Chicago, were by public meetings, intimidation and actual violence, preventing the railroads from performing the public duties for which they were created and greatly injuring their property. The actions of Debs and his followers was a public nuisance of the most serious and alarming kind. It is the duty of the court to protect property and abate nuisances injurious to property. Therefore, it is said that they had a right to issue the injunction, and the injunction being issued, a right to examine into any alleged contempt by the methods ordinarily used by a court of equity when investigating facts. And should the judge on such an examination conclude that the injunction had been violated he had a right to imprison for any length of time he saw fit those who, in his judgment, had disregarded his order.

The argument, on the other side of the question, may be stated somewhat as follows: Admitting that Debs and

his followers were acting in such a way as to be a public nuisance, and to threaten private property, and admitting that the court of equity is especially concerned in the protection of property, it does not follow that this property is under the protection of the courts, or the nuisance of such a character that the court of its own motion can take cognizance of it. It is only property in a particular position, or threatened with injury from a particular source, which equity can interfere to protect. For instance, if I come into a court of equity claiming that my tenant for a term of years, with no right to commit waste, is cutting down the trees on my place, equity will issue an injunction until the rights of the matter can be ascertained. The basis of this action is, that it is the business of the courts to see that one claiming to be the owner of property shall not destroy it or injure it, if another claims an interest in it, until the mutual rights of the parties are determined. It is the claim of right on both sides which gives the court of equity jurisdiction. If a robber threatens to break in my house by night and plunder my premises, did ever any one hear of my going into a court of equity to restrain him?

Again, that courts have jurisdiction to restrain a nuisance is admitted by all; but that alone is a nuisance which the courts will restrain which results from a man's action with his own property so as to adversely affect the property of other private persons or the property of the state. The following instances illustrate what is meant by this distinction. If a railroad company, or persons pretending to be incorporated, and pretending to have authority to lay tracks over private property, commence to do so, the state, or any person whose property is adversely affected, claiming that the pretended corporation, either does not exist, or has not the right which it claims, can obtain from the court a temporary injunction until those rights are determined.

Again, if a man, claiming that a street is his private way, obstructs the free passage of the public, the state can obtain an injunction restraining him from doing so until the rights of himself and the public in the way are determined. Or again,

if one railroad claims that another which is about to cross its tracks has no right to do so, and undertakes to prevent by force of arms the workmen of the first company from crossing their tracks, an injunction can be obtained restraining both parties from altering their position until the question of right has been settled. As to questions of a man's use of his own property which injures the property of others, we can mention a man being restrained by injunction from carrying on a business on his property which is a nuisance to the adjoining owners or to the community. But it is urged that the underlying thought of all these instances is, that the man who is restrained by injunction, is acting as he does under a claim of right in property: *And that by so doing, he has enabled one who disputes that right, to bring him into a civil court to determine the disputed question.* Pending that determination, the property being peculiarly under the care of the court, can be protected by injunction, which the court has the summary right to enforce by commitment for contempt. Debs and the Chicago strikers of last summer made no claim to legal interest in property. Their actions were either innocent or criminal. It is alleged that they were criminal. The constitution provides that no man shall be judged guilty of a crime without indictment and trial by jury and all its attendant incidents.

This view of the case is that which appeals to the writer. The circumstances of the Chicago strikers either did or did not leave the administration of criminal justice and the preserving of social order within the ordinary power of the criminal court and the executive branch of the government. If, as is probable, the executive arm of the government, backed by the ordinary processes of the criminal courts, was not sufficient to protect property and life, then the case should have been treated, as on those facts it was, an exceptional case, and martial law declared. There seems to us to have been no necessity to strain the principles of the procedure of the civil courts, and to make a precedent which will be used over and over again to undermine the most valuable of the safeguards of individual liberty—the trial by jury.

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CITY NATIONAL BANK OF DAYTON v. KUSWORM.¹ SUPREME COURT OF WISCONSIN.

A wife may avoid her contract, extorted by a threatened criminal prosecution of her husband, on the ground of duress; and the fact that after she had signed the contract, the plaintiff gave her the notes forged by her husband, together with others given by him as security therefor, to be given to the husband, which she accordingly did, and the notes were thereupon destroyed by him, does not estop her from avoiding her note extorted at the time under threats of prosecuting the husband.

DURESS.

I. "Duress, in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness:" *Brown v. Pierce*, 7 Wall. 205. It does not necessarily imply that the means used should be in themselves unlawful, but includes the use of lawful means in an unlawful manner, or for an improper purpose; and, on the other hand, even if the means used should be improper, as for instance the threat of a baseless prosecution, there is no duress, unless the threat so operated on the mind of the person threatened as to deprive him of the free exercise of his will. In some of its manifestations, duress is hardly to be distinguished from undue influence: *Lighthall v. Moore*, 2 Colo. App. 554; and it extends not merely to the case of threats, but includes, the

¹ Reported in 39 N. W. Rep. 564.

abuse of one's legal position as owner by title of possession, in order to force the real owner to admit or satisfy an unjust claim, of which the unwarranted detention of property by a pledgee or bailee will serve as an example.

II. Duress at common law was divided into duress by imprisonment, and duress *per minas*, or by threats. To these may be added a third, also recognized by the common law, but not accorded the dignity of a separate existence,—duress of goods. This does not seem to belong properly under either of the preceding divisions; and is now admitted to form a distinct branch of the law of duress.

III. Duress by imprisonment consists in the use of imprisonment, lawful or unlawful, to force the party imprisoned into executing a contract. If the imprisonment be unlawful, the circumstances under which the contract is made cannot clothe it with validity. It makes no difference whether the overtures for the agreement come from the one party or the other. The imprisonment being illegal, the contract is equally so, whether formed at the suggestion of the prosecutor, or at the request of the defendant: *Richardson v. Duncan*, 3 N. H. 508; *Osborn v. Robbins*, 36 N. Y. 365. When, after a person has procured the arrest of another on a criminal charge, which did not justify his arrest, and after his discharge has procured his arrest again on an order in a civil action for fraud, where an arrest was not warranted, he procures from that person, while he is imprisoned, after several months' confinement, and on the promise to obtain bail for him, which is done, a release of himself, and the sureties on the bond given for the order of arrest, the release is given under duress, and will not bar an action on the bond to recover damages for the imprisonment: *Lazzaroni v. Oishi*, 21 N. Y. Suppl. 267. But an arrest and imprisonment on lawful process, used in a proper manner, and only for a lawful purpose, is valid, and cannot be construed as duress: *Nealley v. Greenough*, 25 N. H. 325; *Eddy v. Herrin*, 17 Me. 338; even though no cause of action really existed, if the prosecution was instituted *bona fide* and upon probable cause: *Prichard v. Sharp*, 51 Mich. 432; *Clark v. Turnbull*, 47 N. J. L. 265. A note or other security given

to release the defendant in such a case from prison, may be void as given to compound a felony ; but it cannot be awarded on the ground of duress.

If, however, the arrest and imprisonment are merely for the purpose of enforcing a civil liability, such is an improper use of criminal process, and a security obtained under such circumstances cannot stand : *Seiber v. Price*, 26 Mich. 518 ; *Phelps v. Zuschlag*, 34 Tex. 371. " A contract obtained by duress of unlawful imprisonment is voidable, and if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly, for the purpose of obtaining the execution of a contract, and a contract obtained by means of it is voidable for duress : " *Morse v. Woodworth*, 155 Mass. 233 ; S. C., 29 N. E. Rep. 525.

IV. Duress *per minas* is the most fruitful branch of this theme ; and its varieties are endless. It has been most excellently defined and explained in a lengthy opinion by Knowlton, J., in *Morse v. Woodworth*, 155 Mass. 233 ; S. C., 29 N. E. Rep. 525, already cited, which is well worth quoting more at length :

" The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties, meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract, unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

" To set aside a contract for duress it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held, that threats of civil suits and of ordinary proceed-

ings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. It must also be shown, that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement to it which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted."

In the first place, then, the threat relied upon to constitute duress must be such as to control the mind and will of the party affected, and prevent his acting as a free agent. Whether or not a given threat is of such a nature depends wholly upon circumstances; but the general rule is, that the threats must be such as would naturally excite fear in a person of ordinary courage, and that that fear must be grounded on a reasonable belief that the person threatening has at hand the means to carry his threat into present execution; *Young v. Simon*, 41 Ill. App. 28. In other words, mere bluster cannot constitute duress; and the man who permits himself to be frightened by empty words, cannot set up his cowardice as a sufficient excuse to release him from the performance of his promise: See *Bosley v. Shannon*, 26 Ark. 280; *Wells v. Sluder*, 70 N. C. 55. "To constitute the coercion or duress, which will be regarded as sufficient to make a payment involuntary, . . . there must be some control or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment:" *Rudick v. Hutchins*, 95 U. S. 210. Therefore, if the person, who makes the threats, is not, and is not represented to be, in a position to carry out his threats, and has no means of

executing them other than such as are possessed by all members of the community; when the liberty of the person threatened is in no wise restrained, and the threatener has made no complaint, has no warrant, and is not represented to have, nor, in fact, has, or appears to have at hand or within control, any means for carrying into execution his announced purpose, mere threats of arrest do not constitute duress: *Yonngs v. Simon*, 41 Ill. App. 28. Accordingly, threats of loss of life, or bodily injury, made by one who is in a position to execute his threat, will constitute duress: *Brown v. Pierce*, 7 Wall. 205; *Baker v. Morton*, 12 Wall. 150; and the deed of one who was pulled from his bed at night by a crowd of men, dragged into the street, and compelled to go to the office of a justice of the peace and there execute the instrument in question, may be avoided: *Brown v. Peck*, 2 Wis. 261. So, the threat of a husband to separate from his wife, if she have reasonable cause to apprehend that he will put it into execution: *Tapley v. Tapley*, 10 Minn. 448; or violent behavior toward and cruel treatment of the wife: *Goodrich v. Cushman*, 34 Neb. 460; amount to duress. A security obtained by a threat of immediate arrest and imprisonment is made under duress: *Bush v. Brown*, 49 Ind. 573; *Morrison v. Faulkner*, 80 Tex. 128; *Obert v. Landa*, 5 Tex. Civ. App. 620; S. C., 25 S. W. Rep. 342; and it may still be duress, though the amount for which the note is given is actually due from the maker to the payee: *Taylor v. Jaques*, 106 Mass. 291. If one pays an illegal tax to prevent the issuing of a threatened warrant of distress, which must issue of course, unless the tax is paid, he can recover it: *Preston v. Boston*, 12 Pick. 7; *Grim v. Weissenburg School District*, 57 Pa. 433. But a mere indefinite threat of criminal prosecution, or one made when neither the warrant had issued nor the proceedings had been commenced, is no duress: *Higgins v. Brown*, (Mo.), 5 Atl. Rep. 267; *Harmon v. Harmon*, 61 Me. 227; *Knapp v. Hyde*, 60 Barb., (N. Y.), 80; especially if the person threatened knows that the one who makes the threats has no present means of carrying them into execution, by actually taking him into custody, and has, in his knowledge, the power

and opportunity to make a defence to such threatened prosecution: *Horton v. Bloodorn*, 57 Neb. 666; S. C., 56 N. W. Rep. 321. The mere threat of injury to property, without the power to execute the threat, is not duress: *Miller v. Miller*, 68 Pa. 486.

The reasonableness of the belief of the party claiming duress in the imminence of the threatened danger, is dependent to a very large extent upon circumstances; and is always a question for the jury. When the defendant had threatened to have the plaintiff imprisoned, and to deprive him of his property, because of certain testimony given by the plaintiff derogatory to defendant, though the testimony was, in fact, privileged, which the plaintiff, who was a weak, ignorant man, did not know; and the defendant was a keen business man, and known to the plaintiff to be a man of determination; a sum of money procured from the plaintiff by such threat was held to have been procured under duress: *Baldwin v. Hutchinson*, (Ind.), 35 N. E. Rep. 711. Similarly, when the plaintiff, a man 72 years old, ignorant of the law, was threatened by the defendant with prosecution, imprisonment and a fine of \$500 for selling cider without a license, unless he would pay the defendant \$150, the defendant claiming to have great knowledge of the law; and the plaintiff was confronted with several men, who claimed that he had sold them cider, and was informed by the defendant that the men would so testify on the prosecution; the payment by the plaintiff, under these circumstances, of the sum demanded, was held to have been made under duress, and void, the jury having so found: *Cribbs v. Soule*, 87 Mich. 340; S. C., 49 N. W. Rep. 587.

It has been claimed that the threat of an illegal prosecution is not duress, because the person threatened has really nothing to fear therefrom, and besides, it is his duty to resist a false accusation: *Hinchman v. Seaborn*, 9 Mo. App. 352; see *Horton v. Bloodorn*, 57 Neb. 666; S. C., 56 N. W. Rep. 321. It was held, however, in *Bane v. Detrick*, 52 Ill. 19, that though the arrest would be illegal, yet if the threats were such would terrify a man of ordinary and reasonable firmness,

they would constitute duress. It is difficult to treat such decisions seriously. The mere danger of imprisonment is not the thing to be feared in the case of an innocent man; it is the loss of reputation that inevitably follows on a criminal prosecution, no matter how innocent the accused may be, and however triumphant his acquittal; the annoyance and grief caused his friends and relatives; and the expense of defending himself, with the troubles and worry that the very fact of such an accusation, with its results, will cause any but the most depraved to feel. It is safe to say that nine men out of ten who would defy the chance of being sent to jail under such circumstances, would nevertheless, in view of these other consequences, seek to stifle the accuser, and submit to his demands, rather than run the gauntlet of public criticism under such auspices. The contrary rule, that a contract procured by threat of illegal arrest is obtained under duress, is the only true doctrine. See *Lighthall v. Moore*, 2 Colo. App. 354; S. C., 31 Pac. Rep. 511.

The threats used must also be such as, if executed, would work a substantial injury to the person threatened; and not be a mere declaration of an intention to assert a legal right. A threat of a civil suit, therefore, is in general no ground for a claim of duress: *Mascolo v. Montesanto*, 61 Conn. 50; S. C., 23 Atl. Rep. 714; *Peckham v. Hendren*, 76 Ill. 47; *Dausch v. Crane*, 109 Mo. 323; *Pryor v. Hunter*, 31 Neb. 678; *McCormick v. Volsack*, (S. Dak.), 55 N. W. Rep. 145; nor is a threat to levy a lawful execution: *Wilcox v. Howland*, 23 Pick. 167. It is not unlawful for a creditor to demand and obtain from his debtor a security for a *bona fide* debt, under a threat of suit if the security be not given; and the debtor cannot avoid payment of the security merely on the ground that it was obtained by means of such a threat: *McClair v. Wilson*, 18 Colo. 82; S. C., 31 Pac. Rep. 503. But a threat to use oppressive civil process may be equivalent to duress; as, for instance, where a materialman threatened to file a mechanics' lien on a house, unless the owner, who had overpaid the contractor, would pay an indebtedness of the contractor to the materialman for material, alleged to have been used in the house,

representing at the same time to the owner that the filing of the lien would, in the then condition of his affairs, seriously embarrass him, and thereupon furnished a fraudulent statement of the alleged indebtedness, including items furnished to the contractor for use on other buildings: *Gates v. Dundore*, 18 N. Y. Suppl. 149. See *Forster v. Squirr*, 19 N. Y. Suppl. 367.

There is some difference of opinion as to whether a threat of lawful imprisonment, made to a person who has violated the criminal laws, can be called duress: *Bodine v. Morgan*, 37 N. J. Eq. 426. It has been held that a promissory note, taken in payment of money embezzled, is not necessarily voidable because obtained on threats of criminal prosecution, as there is a good consideration for it, viz., the money embezzled: *Hilborn v. Buckman*, 78 Me. 482; S. C., 7 Atl. Rep. 272; *Thorn v. Pinkham*, (Me.), 24 Atl. Rep. 718. But it has also been held that written securities extorted by threats of prosecution for a criminal offence of which the party is, in fact, guilty, but which are in no manner connected with the demand for which compensation is sought, may be avoided by the persons executing them: *Thompson v. Niggly*, (Kan.), 35 Pac. Rep. 290. The true rule seems to be, that when the threat is made merely to enforce the execution of the contract, and to compel the person accused to a settlement, it will be duress; otherwise not. To quote again from Judge Knowlton: "The question is, whether the threat is of imprisonment, which will be unlawful in reference to the conduct of the threatener, who is seeking to obtain a contract by his threat. Imprisonment that is sufficient through the execution of a threat, which was made for the purpose of forcing a guilty person to enter into a contract, may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws, which were made for another purpose, and he is in no position to claim the advantage of a

formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's. . . . We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But, if the fact that he is liable to arrest and imprisonment, is used as a threat to overcome his will and compel a settlement, which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful, and, if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement:" *Morse v. Woodward*, 155 Mass. 233; S. C., 29 N. E. Rep. 525.

In the second place, the threats must be shown to have emanated from, or at least to have been made with the knowledge of the person who is to be benefited by the transaction: *McClatchie v. Haslam*, 63 L. T. N. S. 376. False representations of third parties, not instigated by the creditor, are no ground for proving duress: *Fulton v. Hood*, 34 Pa. 365. Representations made to a wife by her brother and husband that the latter is in danger of criminal prosecution by a bank, but made without the knowledge or authority of the bank, are not duress: *Compton v. Bunker Hill Bank*, 96 Ill. 301; see *Central Bank of Frederick v. Copeland*, 18 Md. 305; nor are such representations, when made by the husband alone: *Mundy v. Whittemore*, 15 Neb. 647; S. C., 19 N. W. Rep. 694. But even if the threats emanate from the creditor, the fact that friends advise the debtor in good faith to make a settlement, will not constitute duress, although he knows of the threats: *Phillips v. Henry*, 160 Pa. 24; S. C., 28 Atl. Rep. 477.

In the third place, it is not necessary that the threats be of

a prosecution of the party in whose favor duress is claimed. The protection of the doctrine extends to all those who occupy a relation to the person threatened which renders them subject to be so affected by his danger as to be no longer free agents. Thus, a father may be subjected to duress by a threat to imprison his son, and this whether the charge be true or false: *Williams v. Bayley*, 1 L. R. H. L. 200; affirming *Bayley v. Williams*, 4 Giff. 638; *Small v. Williams*, 87 Ga. 681; S. C., 13 S. E. Rep. 589; *Harris v. Carmody*, 131 Mass. 51; *Bryant v. Peck & Whiffle Co.*, 154 Mass. 460; S. C., 28 N. E. Rep. 678; *Western Ave. Bldg. Assn. v. Walters*, 7 Ohio Cir. Ct. 202; *Natl. Bk. of Oxford v. Kirk*, 90 Pa. 49; *Coffman v. Lookout Bank*, 5 Lea, (Tenn.), 232; *Schultz v. Culbertson*, 49 Wis. 122; S. C., 4 N. W. Rep. 1070; a mother may be put in duress by a threat against her child: *So. Exp. Co. v. Duffy*, 48 Ga. 358; *Meach v. Lee*, 82 Mich. 274; S. C., 46 N. W. Rep. 383; *Met. Life Ins. Co. of N. Y. v. Mecker*, 85 N. Y. 614; *Schorner v. Lissauer*, 107 N. Y. 111; S. C., 13 N. E. Rep. 741; *Jordan v. Elliott*, 12 W. N. C. 56; *Foley v. Greene*, 14 R. I. 618; or a child, by threats to prosecute his parent: *Adams v. Irving Natl. Bk. of N. Y.*, 116 N. Y. 606; S. C., 23 N. E. Rep. 7. So, also, a threat of prosecution of the husband will be duress sufficient, in a proper case, to avoid the contract of the wife made to prevent such prosecution: *McClatchie v. Haslam*, 63 I. T. N. S. 376; *First Natl. Bk. of Nevada v. Bryan*, 62 Iowa, 42; S. C., 17 N. W. Rep. 165; *Winfield Natl. Bk. v. Croco*, 46 Kans. 620; *Central Bk. of Frederick v. Copeland*, 18 Md. 305; *Miller v. Union Lumber Co.*, 98 Mich. 163; S. C., 57 N. W. Rep. 101; *Eadie v. Simmons*, 26 N. Y. 9; *City Natl. Bk. of Dayton v. Kustorum*, (the principal case), (Wis.), 59 N. W. Rep. 564. The same is true of a sister, whose brother is threatened, even though the threats were not made directly to her, if they were intended to be communicated to her, and were in fact so communicated. *Schultz v. Catlin*, 78 Wis. 611; of a grandparent, in the case of a grandson, who is also an adopted child, and for whom she has great affection: *Bradley v. Irish*, 42 Ill. App. 85; of an aunt, in the case of a nephew, to whom she is

greatly attached: *Sharon v. Gager*, 46 Conn. 189; and of a woman, whose betrothed is threatened on the eve of the marriage; *Ran v. Von Zedlitz*, 132 Mass. 164. It may be safely affirmed that this rule extends to all the domestic relations.

In any case, it is not necessary that the threats be contemporaneous with the making of the contract; in fact, in the case of transmitted threats, it is impossible that such should be the case. It is, therefore, sufficient, if the threats be the inducement of the contract; and, the fact that they were made a few days before its execution will not prevent it from being avoided on the ground of duress, if they have not been retracted, (to the knowledge of the person giving the security), during the intervening time: *Taylor v. Jaques*, 106 Mass. 291.

V. The rule as to duress of goods, similar to that laid down in the case of duress by imprisonment, is, that any contract, obtained by one in possession of the goods of another, through an illegal retention of the goods until his demands are complied with, may be avoided by the owner of the goods; and the same is true where the goods are lawfully retained, but with an illegal intent. "Duress of goods may exist when one is compelled to submit to an illegal exaction, in order to obtain them from one who has them in possession, but refuses to surrender them, unless the exaction is submitted to:" *Hackley v. Headley*, (Mich.), 8 N. W. Rep. 511. The refusal to allow the redemption of a pledge, except upon payment of an illegal claim, falls under this rule: *Astley v. Reynolds*, 2 Str. 915; *Stenton v. Jerome*, 54 N. Y. 480; as does the refusal of a carrier to deliver property to a consignee, without the payment of an illegal charge: *Ashmole v. Wainwright*, 2 Q. B. 837; *Harmony v. Bingham*, 12 N. Y. 99; *Baldwin v. Liverpool & Gt. West. S. S. Co., Ltd.*, 74 N. Y. 125; the detention of a raft of lumber, in order to extort illegal toll: *Chase v. Dwinal*, 7 Me. 134; and, in short, any refusal to deliver property to its owner until a disputed claim is paid, if the claim appear afterwards to have been unwarranted: *Shaw v. Woodcock*, 7 B. & C., 73; *Scholey v. Mumford*, 60 N. Y. 498; *White v. Heylman*, 34 Pa. 142. So, an unlawful refusal to clear a vessel until certain claims are paid,

will be duress : *McPherson v. Cox*, 86 N. Y. 472 ; *Baldwin v. Sullivan Timber Co.*, 20 N. Y. Suppl. 496 ; and when the plaintiff contracted to buy certain cattle and paid \$175,500, leaving a balance of \$27,000 due, and discovered, before paying that balance, that property to the value of \$14,110, covered by the contract of sale, had been delivered to other parties, but could not get possession of any part of the purchase without completing the stipulated payment ; and unless he took possession, the property would be at great risk of loss for want of care during the winter just beginning ; it was held that the payment of the balance under protest was extorted by duress, and that the plaintiff could maintain a suit to recover the value of the property wrongfully delivered to others : *Loneragan v. Buford*, 148 U. S. 581 ; S. C., 13 Sup. Ct. Rep. 684 ; affirming *Buford v. Loneragan*, 22 Pac. Rep. 164.

The property, however, must be that in which the owner has an existing right of possession ; a mere refusal to pay a debt : *Doyle v. Rector*, 133 N. Y. 372 ; *Miller v. Miller*, 68 Pa. 486 ; or a threat to withhold payment of a debt already due : *Cable v. Foley*, (Minn.), 47 N. W. Rep. 1035 ; is not duress. In *McCormick v. Dalton*, (Kans.), 35 Pac. Rep. 1113, D. had a parol contract with M. to grade a mile of roadbed for a railroad at a stated price per cubic yard, and M., desiring to abrogate the verbal contract, demanded of D. the signing of a written contract for half a mile only of the heaviest part of the grading, at the same price per cubic yard, and upon his refusing to sign, because the written contract did not correspond with the verbal one, M. said to the men working for him : " I will stand good for no more work you do for D., and D. can stop at once." D., because of his financial condition, was unable to carry on the work, unless M. paid the men, and after studying over the matter for a few days, signed the contract. On these facts, it was held that the contract could not be said to have been signed by D. under duress. But it comes at least very near the border line.

Similarly, a threat by a lessor to eject a tenant at will, unless he will pay a sum demanded as rent, is not such duress as will entitle the tenant to recover the rent so paid, though

more is demanded than is actually due, and the tenant pays it under protest: *Emmons v. Scudler*, 115 Mass. 367; and the demand by a labor union of a certain sum, for supplying journeymen to a baker whose men have deserted him, is not duress, especially when the charge made is a usual one: *Grabowski v. Gwierz*, 17 N. Y. Suppl. 528.

VI. A contract extorted by duress is not void, but voidable only; and the right to rescind it, or to recover payments made under it, may be lost by laches, acquiescence or ratification: *Foerster v. Squier*, 19 N. Y. Suppl. 367. A delay of seven years in asserting duress will render necessary the presentation of a very strong case, in order to authorize the interference of a court of equity: *Davis v. Fore*, 59 N. W. Rep. 125. Acquiescence may be presumed after the lapse of three years: *Gregor v. Hyde*, (C. C. A.), 62 Fed. Rep. 107. When a deed is extorted from a grantor, under the pressure of a threat of prosecution for larceny, and possession is given under the deed, but no steps are taken to avoid it until the prosecution is barred, it is a ratification: *Eberstein v. Willets*, 134 Ill. 101. And when a deed is executed in consequence of threats of criminal prosecution against the grantor's husband, and the grantor, with full knowledge of its invalidity, and of the fact that her husband has escaped to a foreign country, and is beyond the reach of criminal process, voluntarily executes another deed to the grantees, to induce them to purchase a lot of household furniture on the premises, the former deed is ratified: *Müller v. Minor Lumber Co.*, (Mich.), 57 N. W. Rep. 101.

VII. The validity of a contract made under duress may be attacked either directly, by bill in equity for relief, or by way of defense to a suit thereon. In either case, the fact that the contract was executed, or payment made, with full knowledge of all the facts, will not estop the person injured from alleging the duress: *Buford v. Lonergan*, 22 Pac. Rep. 164; affirmed in *Lonergan v. Buford*, 148 U. S. 581; S. C., 13 Sup. Ct. Rep. 684; nor will he be estopped by the fact that the evidences of the crime were delivered on the execution of the contract, and have since been destroyed by him: *City Natl.*

lik. of Dayton v. Kusworm, (the principal case), (Wis.), 59 N. W. Rep. 564. On a bill for relief, the fact that the consideration was illegal, being to compound a felony, will not prevent the plaintiff from obtaining the relief sought: *Bryant v. Pick & Whiffle Co.*, (Mass.), 28 N. E. Rep. 678. In a suit on a contract, the fact that the plea or answer does not formally set up the defence of duress will not prevent that defence, if found in the evidence, from availing to defeat recovery: *Morrill v. Nightingale*, 93 Cal. 452; S. C., 28 Pac. Rep. 1068; especially if the evidence thereof has been admitted without objection: *First Natl. Bk. of Nevada v. Bryan*, 62 Iowa, 42; S. C., 17 N. W. Rep. 165. A contract obtained by duress is void in the hands of a holder with notice: *Thompson v. Niggley*, (Kans.), 35 Pac. Rep. 290; *Brown v. Pick*, 2 Wis. 261; but when a debtor has assigned a claim to a creditor to pay a just debt, his assignee for the benefit of creditors cannot, without his authority, claim that that assignment was made by duress, probably on the ground that the duress, being a tort, is a personal claim of the debtor, and does not pass by the assignment: *Phillips v. Henry*, 160 Pa. 24; S. C., 28 Atl. Rep. 477. X.

[The above does not profess to be an exhaustive collection of the cases on the subject of duress. To collate the authorities upon that subject, would be, as was said by Judge Gray, in *Youngs v. Simon*, 41 Ill. App. 28, "an almost endless task." The aim of the writer has been simply to present the outline of the subject, with especial reference to the more recent cases. The older ones will be found collected in 6 Am. & Eng. Encyc. of Law, 64 *et seq.*].

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TIMES PUBLISHING CO. v. CITY OF EVERETT.¹ SUPREME
COURT OF WASHINGTON.

The general statutes, § 130 of the State of Washington, provide that in cities of the third-class the council shall annually, at a stated time, contract for doing all city printing and advertising, which contract shall be let to the lowest bidder. At the proper time two bids were presented to the defendant city and the council awarded the contract to B, whose bid was at \$1 per inch for solid nonpareil for the first and 50 cents for each subsequent insertion, while appellant's bid was at 25 and 15 cents respectively for the same, the council declaring by resolution that B was the lowest and best bidder. *Held*, that a city will not be compelled by mandamus to award a contract to the lowest bidder for city work required by statute to be let to the lowest bidder.

OPINION OF THE COURT.

STILES, J. "The generally accepted rule is that the courts will not by mandamus compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder in a competition of this kind."

MANDAMUS AND THE LOWEST BIDDER.

The rule as stated by STILES, J., like all general rules, is not without its qualifications and like most applications of the common law to statutory law is subject to varying refinements in different States. Our labor will not be lost if we make clear the grounds on which the decisions have been based.

¹ Reported in 37 Pac. Rep. 695 (1894).

It has been well said that a mandamus will lie where there is (a) a clear legal right in the relator, (b) a corresponding duty in the defendant, and (c) a want of any other adequate and specific remedy: *Commonwealth v. Councils of Pittsburg*, 34 Pa. 496; and a mandamus has been refused to the lowest bidder for a city contract, because either one or all of these three essentials have, in the opinion of the learned court, been lacking. The grounds for the refusal of the writ may for our purpose be arranged, however, in a more convenient order as follows: 1. The duties of the proper authorities in such a case are discretionary and not ministerial simply; 2. It would be against public policy to cancel a contract and award it to another where the work has already been entered upon or completed and expenses incurred; 3. Such statutes are for the benefit of the State and not for individual bidders, and, therefore, the relator has no clear legal right. We will consider these three heads separately as much as may be.

1. It was on the first ground that the decision in the principal case was rested rather than on the second. For, as the petition prayed both for an injunction to restrain the city and B from carrying out the contract and also for a mandamus to compel the awarding of the contract to the petitioner, the court reversed the judgment of the court below for defendant on demurrer, and though the contract had been awarded, they remanded the cause with instructions to overrule the demurrer and proceed upon the cause of action sustained. It was sought to distinguish this from *Raum v. Sweeney*, 5 Wash. 712; S. C., 32 Pac. Rep. 778 [1893], on the ground that that was an appeal from the commissioners to the superior court direct. That case arose under the same statute, which required the public printing to be awarded to the lowest bidding newspaper, which must have been published in the county for six months prior, and the county commissioners awarded the contract to a paper which had not been published for six months. It was held that it was proper to direct the commissioners to relet the contract as provided by law, although this was a virtual mandamus to let it to the only other bidder, for under the facts as there was only one legal bid, the commissioners had no

discretion. But it is hard to see a very marked distinction between a mandamus on an appeal direct from the award and a mandamus in a suit separate and apart from an appeal.

The rule as stated in the principal case seems to be firmly established in Pennsylvania. The case of *Commonwealth ex rel. v. Mitchell et al.*, 82 Pa. 343 [1876], in construing the Act of May 23, 1874, which requires that "all work and materials required by the city . . . shall be performed under contract to be given to the lowest responsible bidder," held that the word responsible was not limited in its meaning to pecuniary responsibility, but in contracts whose execution required judgment and skill as well as pecuniary ability, the statute imposes duties and powers which are deliberative and discretionary, and, therefore, where the city authorities have exercised a discretion, mandamus will not lie to compel them to modify their decision, even though their action was erroneous (as in this case), in the absence of clear proof of fraud or bad faith. This decision was affirmed in *Douglass v. Commonwealth*, 108 Pa. 559 [1885].

The Illinois rule is the same, where the charter of the city of Chicago contained this provision: "All contracts shall be awarded by said board to the lowest reliable and responsible bidder or bidders who shall have complied with the above requisition, and who will sufficiently guarantee to the satisfaction of said board the performance of said work," and the Board of Public Works advertised for sealed proposals for the construction of a new "lake tunnel" of the estimated value of \$400,000, reserving the right to reject any bid not in accordance with the conditions of the advertisement or to reject all bids, it was held no mandamus would issue at the suit of one whose bid was \$4,000 less than the one accepted. The court said "Whenever the act sought to have done requires the exercise of discretion, this remedy will not lie:" *Kelly v. City of Chicago*, 62 Ill. 279 [1871].

In Missouri, in a case arising under a statute similar to that in the principal case requiring the contract for printing to be awarded the lowest responsible bidder, the court refused to interfere, because the statute gave the board discretionary

power: *State ex rel. v. McGrath et al., Commissioners of Public Printing*, 91 Mo. 386 [1886].

2. In New York State the rule seems to be that where the contract has been entered into and expense incurred mandamus will not be issued. The case of *People v. Canal Board*, 13 Barb. 432 [1852], is hardly in point, for under the facts of the case the board had undoubtedly much greater discretion than in the cases we are considering, where the statute requires the contract to be awarded to the lowest responsible bidder. In this case the canal board resolved to award the contracts "to such parties as shall propose to perform the work on terms most safe and advantageous to the State, having due regard to price, the ability of the parties and the security offered," and a mandamus to compel the board to approve of a contract entered into by the State engineer was refused on the ground that the mandamus was really an action against the State, and further that the relator had shown no clear legal right. But in the *People ex rel. Belden v. Contracting Board*, 27 N. Y. 378 [1863], the law required the canal contracting board to award all contracts for repairs to "the lowest bidder who will give adequate security," and the proposals for a contract required a certificate of deposit of \$4,000 in cash to accompany the bid. Belden's bid was accompanied by the required certificate, save that the words "in cash" did not appear, and the board, for this reason, refused to award the contract to him. The Supreme Court criticized this technical objection, but refused to issue a mandamus to cancel the contract already awarded and enter into one with the relator. EMOTT, J., adverted to the principle that wherever the act requires the exercise of discretion the remedy by mandamus will not lie, but based his decision on the ground that the contract was already awarded. "The Supreme Court ought not to have compelled the board by mandamus to reverse their action or to make a contract with relator, after they had already made another contract with another person." SELDEN, J., dissented on the ground that the statute made it the absolute duty of the board to award the contract to the lowest bidder. This decision was con-

siderably shaken in *People ex rel. Vickman v. Contracting Board*, 46 Barb. 254 [1865], where the proposals called for a certificate of deposit to the order of the auditor, and relator filed one to his own order, but endorsed to the order of the auditor, and for this reason the bid was rejected, though he was the lowest bidder. *Held*, that the board had no discretion in the matter, but should give the contract to relator. It was distinguished from *People ex rel. Belden v. Board*, *supra*, on the ground that there the contract had already been entered into with another. It was also pointed out that but four of the judges concurred with the opinion of EMOTT, J., in that case which was not a majority, and they only concurred generally. See also *People ex rel. Lumey v. Campbell*, 72 N. Y. 496 [1878]; *People v. Wendell*, 57 Hun. 362 [1890].

Michigan follows the New York rule: *Detroit Free Press v. Board of Auditors*, 47 Mich. 135 [1881].

In *Talbot Paving Co. v. Common Council*, 51 N. W. Rep. 933 [Supreme Court Michigan, 1892], the contract had been performed by another, and the court in its discretion refused to grant a writ of mandamus. This was on the ground that the city would have to pay twice for the work, if the mandamus was issued.

3. Such statutes are for the benefit of the State and not for individual bidders, and therefore the relators have no clear legal right. This is the rule adopted by Wisconsin. Where the charter of the city required the work on a school-house to be let out to "the lowest responsible bidder," and relators showed that they were the lowest bidder and that they were responsible, PAINZ, J., held that in such a case "the lowest bidder has no such fixed absolute right that he is entitled to a mandamus to compel the letting of the contract to him, after his bid has been in fact rejected and the contract awarded to another. The statutory provision requiring the contract in such cases to be let to the lowest bidder is designed for the benefit and protection of the public and not of the bidder:" *State ex rel. v. Board of Education*, 24 Wis. 683 [1869]; see, also, *Kelly v. City of Chicago*, 62 Ill. 279 [1871]. The Supreme Court of Maryland in refusing a mandamus where

the work had already been entered upon said: "It is of much more importance that a public contract like the one in question should be promptly awarded and speedily executed with due regard to economy than that any particular bidder should get the contract:" *Madison v. Harbor Board of Baltimore*, 25 Atl. Rep. 337 [1892].

The same rule was applied in Vermont, where on the face of the petition the granting of the mandamus would be disadvantageous to the State, as the contract had already been awarded to one B at a figure \$2,000 less than relator's bid, as the principal object of the law was to benefit the State: *Free Press v. Secretary of State*, 45 Vt. 7; also, *Welsh v. Board of Supervisors*, 23 Iowa, 203 [1867].

Where the Legislature has left the matter of placing contracts in the discretion of the proper authorities and have enacted no statute requiring contracts to be awarded to the lowest responsible bidder, the writ has been refused: *Mayo v. County Commissioners*, 141 Mass. 74 [1886]; *State ex rel. Hunt v. Board, etc., Dixon County*, 24 Neb. 106 [1888]; *State ex rel. Rare v. Lincoln County*, 35 Neb. 346 [1892]; S. C., 53 N. W. Rep. 147.

The courts of Ohio and Nebraska have both decided that where the proper facts are shown a mandamus will lie to award the contract to the lowest bidder. Where the statute required the contract to be awarded to the person "who shall offer to perform the labor and furnish the materials at the lowest price and give good and sufficient bond," and the commissioners had awarded the contract to R for \$13,000 more than B's bid, though it was claimed by the commissioners that R's bid included the brick which was not, however, named in the specifications submitted by the architect; *Held*, that a peremptory mandamus would issue in favor of B. "It is the obvious policy and intention of the statute to render such favoritism impossible. The commissioners are invested with no such discretion. On the contrary, it is the clear intent and policy of the statute to withhold it and thereby shut the door against all favoritism:" *Born & Guckes v. Commissioners of Darke County*, 21 Ohio, 311 [1871]. But the writ was refused

to one who had slept on his rights: *State v. Commissioners of Printing*, 18 Ohio, 386 [1868]; and the relator must show that his was actually the lowest bid: *State v. Commissioners of Hamilton County*, 20 Ohio, 423 [1870]; and that he has fully complied with the specifications: *American Clock Co. v. Commissioners of Licking County*, 30 Ohio, 415 [1877]. But where the award has been made to the lowest bidder, and he has failed to enter into the contract by giving sufficient security, the commissioners have the right to readvertise and will not be compelled by mandamus to give the contract to the next lowest bidder: *State v. Commissioners of Shelby County*, 36 Ohio, 326 [1881]. Where the trustees of an asylum had allowed B to change his bid and thus lower it after the proposals had been opened, on the ground that he had included an article not called for in the specifications, it was held a mandamus would lie to compel the awarding of the contract to the original bidder, as the trustees had no right to accept any but the original proposals. "The statute knows no other proposals or offers but these. The trustees are invested with no discretion in the matter; but, on the contrary, we are satisfied it is the intent and policy of the statute to withhold it and thereby shut the door against all favoritism on the part of the trustees on the one hand, and on the other to prevent such an excited intriguing, and perhaps ruinous scramble among bidders as would be not unlikely to ensue if the proceedings were assimilated to an open auction sale of contracts:" *Beaver & Butt v. Trustees of Blind Asylum*, 19 Ohio, 97 [1869].

In Nebraska, where the statute enacted that the county commissioners might let contracts to "the lowest competent bidder" it was held that this was mandatory on the commissioners, and, if they did not give the contract to the lowest bidder, mandamus would issue. As to the right to maintain this action the court say: "There is no doubt of the right of the lowest responsible bidder or of a tax-payer of the proper county in a proper case to maintain an action of this kind, and in no other way can the rights of bidders and the public be fully secured and enforced:" *People v.* 1873 of

Buffalo County, 4 Neb. 150 [1875]. In its opinion the learned court quoted Judge Dillon as follows: "The cases sustain the doctrine that what public corporations or officers are empowered to do for others, and which is beneficial to them to have done, the law holds they ought to do. . . . The power, in such cases, is conferred for the benefit of others and the intent of the Legislature, which is the test in such cases ordinarily seems, under such circumstances, to be to impose a positive and absolute duty:" *Dillon on Municipal Corp.*, § 62. Here as in Ohio the relator must show that his bid conforms with the specifications: *State ex rel. Sitzer v. Kendall*, 15 Neb. 263 [1883]; *State ex rel. v. County Board of York County*, 17 Neb. 643 [1885].

As to the right of the lowest bidder to bring this action for mandamus in his own name instead of the attorney-general's the cases differ: *State v. Board of Education*, *supra*; *People v. Buffalo County*, *supra*. Michigan has adopted the same rule as Nebraska. In *Ayers v. State Auditors*, 42 Mich. 422 [1880], the court pertinently asks, "In as much then as the attorney-general refuses to appear and seek the enforcement of the statutory provision (to award to the lowest bidder) does his refusal preclude its enforcement? And, if not, is the relator authorized to bring the matter before this court?" And the court answers this in the affirmative by declaring that where as here the attorney-general had compromised himself as adviser of the State officers, and so would not petition for the writ and refused to appear and seek the enforcement of the statutory provision, then it was proper for one who, as here, had some interest in the matter, as one who was engaged in business, which made him a competent bidder, to petition for the writ. It has been decided in New York State that in all cases requiring redress and involving a matter in which the interests of the public at large are concerned, and in respect to which a mandamus is a proper remedy, it is competent for the courts to act upon the relation and motion of a private citizen of the State: *People v. Collier*, 19 Wend. 56 [1837]; *People v. Tracy Judge*, 1 Denio, 617 [1845]. This doctrine has been followed by the Supreme Court of Illinois:

Pike v. State, 11 Ill. 202; *Hall v. Propie*, 57 Ill. 312; *Village of Glencoe v. People*, 78 Ill. 390. This, however, seems to be opposed to the English rule, and Maine, Massachusetts and Pennsylvania have maintained a contrary doctrine, and hold that to entitle an individual citizen to be heard as relator, and on his own motion he must show that he has some individual interest in the subject-matter of complaint, which is not common to all the citizens of the State: *Commonwealth v. Mitchell*, 82 Pa. 343 [1876]; *Mayo v. County Commissioners*, 141 Mass. 74 [1886].

Where the specifications call for bids upon a patented article in the control of one company, as the Nicholson pavement, the courts again differ as to the legality of the contract. California and Wisconsin have declared such contracts illegal and void: *Nicholson Pavement Co. v. Painter*, 35 Cal. 699 [1868]; *Dean v. Charlton*, 23 Wis. 590 [1869]; also approved in New York, *Dolan v. Mayor*, 4 Abb. Pr. N. S. 397 [1868]; and in Louisiana, *Burgess v. Jefferson*, 21 La. An. 143 [1869]. The Michigan courts hold such contracts legal: *Hobart v. Detroit*, 17 Mich. 246 [1868].

The principal point to be determined before granting a mandamus in the cases we have been discussing, would seem to be the intention of the Legislature in enacting that all contracts should be given to "the lowest responsible bidder," or "the lowest bidder giving satisfactory security." If they meant to limit the discretion of the city or county authorities to the mere awarding of the contract to the lowest and most responsible bidder, then it would seem that the right to the award of the contract is complete as soon as the bids are opened and the lowest bidder appears, and it is difficult to see wherein the contracting official acts otherwise than as a ministerial officer. While, if the Legislature intended, as the Pennsylvania cases hold, to give the contracting officer full discretion in the awarding of contracts, it is hard to see why any restriction was placed on him at all. It has been well said that a provision in a city charter, that all contracts should "be given to the lowest responsible bidder giving adequate security, was inserted in the charter undoubtedly to prevent favoritism,

corruption, extravagance and improvidence in the procurement of work and supplies for the city, and it should be so administered and construed as fairly and reasonably to accomplish this purpose:" *People ex rel. Coughlin v. Gleason*, 25 N. E. Rep. 4 [N. Y. Ct. of App. 1890].

It is true that, as in the principal case, an injunction will sometimes be granted to restrain the proposed contract with a higher bidder; *Mazet v. Pittsburgh*, 137 Pa. 548 [1890]. But the injunction is a negative remedy, and it is a question whether the courts do not virtually nullify the statute and disregard the intention of the Legislature by refusing the writ of mandamus.

CHARLES F. EGGLESTON.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. & E.H.B., Esq., 734 Drexel Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

A TREATISE ON THE LAW OF RES JUDICATA, including the Doctrines of Jurisdiction, Bar by Suit and Lis Pendens. By HUKM CHAND, M.A. Printed at the Education Society's Steam Press, Byculla, Bombay. William Clowes & Son, London. William Green & Sons, Edinburgh. 1894.

A TREATISE ON GENERAL PRACTICE, containing Rules and Suggestions for the Work of the Advocate in the Preparation for Trial, etc. By BYRON K. ELLIOTT and WILLIAM F. ELLIOTT. Two Volumes. Indianapolis and Kansas City: The Bowen-Merrell Co. 1894.

AMERICAN PROBATE LAW AND PRACTICE. A Complete and Practical Treatise Expository of Probate Law and Practice as it obtains to-day. By FRANK S. RICE. Albany, N. Y.: Matthew Bender. 1894.

THE NATURE OF THE STATE. By DR. PAUL CARUS. Chicago: The Open Court Publishing Co. 1894.

TENURE AND TOIL; OR, LAND, LABOR AND CAPITAL. By JOHN GIBBONS, LL.D. Chicago: Law Journal Print. 1894.

EXPOSITION OF THE LAW OF CRIMES AND PUNISHMENTS. By JOHN B. MINOR, LL.D. Richmond: Printed for the Author, ANDERSON BROTHERS, University of Virginia. 1894.

THE FEDERAL INCOME TAX EXPLAINED. By JOHN M. GOULD and GEORGE T. TUCKER. Boston: Little Brown & Co. 1894.

SELECTED CASES, ETC.

A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW. By JOSEPH HENRY BEALK, JR., Assistant Professor of Law in Harvard University. Cambridge: Harvard Law Review Publishing Association. 1894.

CASES ON CONSTITUTIONAL LAW, with Notes. Part III. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever. 1894.

THE AMERICAN DIGEST. (Annual, 1894.) Being Volume VIII of the United States Digest, Third Series Annual. Also, the Complete Digest for 1894. Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul: West Publishing Co. 1894.

CASES FOR ANALYSIS. Materials for Practice in Reading and Stating Reported Cases, Composing Head Notes and Briefs, Criticizing and Comparing Authorities and Compiling Digests. By EUGENE WAMBAUGH, LL.D. Boston: Little, Brown & Co. 1894.

THE STUDY OF CASES. A Course of Instruction in Reading and Stating Reported cases, etc. By EUGENE WAMBAUGH, LL.D. Second Edition. Boston: Little, Brown & Co. 1894.

BOOK REVIEWS.

PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY.

By the late EDMUND ROBERT DANIELL, Barrister-at-Law. Sixth American Edition, with Notes and References to American Decisions, &c., adapting the work to the demands of American Practice in Chancery. By JOHN M. GOULD, Ph. D., author of the "LAW OF WATERS," &c. In three volumes. Boston: Little, Brown, & Co. 1894.

It is a work of supererogation at this day to say anything in praise of a book that has so thoroughly commended itself to the legal profession, and been the recipient of such eulogy from the most learned members of the bench and bar, as DANIELL'S CHANCERY PRACTICE. At its first appearance, it took precedence of all other text books on the subject, and has retained that position, without a rival. Other works, of greater or less value as brief epitomes of the principles and practice of equity, have from time to time appeared, and by their less cost obtained a considerable clientele; but DANIELL has always been, and still is, the most exhaustive and masterly work on "Chancery Practice," in its fullness and accuracy of detail, comprehensiveness of plan, and logical arrangement. All these features are enhanced by the skilful editing of the present edition, which has been enriched with a vast number of additional citations, bringing the cases down to a very recent date.

In particular, the equity rules of the Supreme Court of the United States have now been annotated for the first time, with all the federal decisions relating to their construction—a feature of the work, which alone will render the book even more indispensable to the equity lawyer than it has previously been (if the grammarians will permit the expression). But in addition, all the recent cases on Equity Practice in the Code States, as well as in the common law States, have been added, with

copious citations referring to and elucidating the many peculiar developments of the English Chancery system; thus giving a complete view of the history and present condition of Equity Procedure. The results of this fulness of treatment may be seen everywhere throughout the book.

There are some minor points in which this present edition might have been improved upon. The notes, during the years that have elapsed since the first issue of the book, have been loaded with such a plethora of additional cases, as to necessitate their being printed in very small, and therefore trying type. It might have been better if the work had been printed in four volumes, though this would, perhaps, have hindered its sale. The notes are also in a somewhat chaotic state, owing to the last editor having printed many of his notes as addenda to the original ones, though also incorporating a large number of cases in the text of the old notes. It would have been far better, though of course a great addition to the labor required, if the notes had been wholly recast, and all the new matter worked into them.

The general use of the West Co. Reporters, also, renders a double citation of cases almost essential now-a-days in any text book that aspires to a general audience; but this will be found to be rarely the case in this book. These blemishes, however, are but trifling compared with the real value of the work that Mr. GOULD has done in this edition; and DANIELL'S CHANCERY PRACTICE may be safely affirmed to be more than ever the one essential book, both for study and for practical use, in reference to the practice in Courts of Equity; indispensable alike to the student, the practitioner and the judge.

X.

THE LAW OF EMINENT DOMAIN IN THE UNITED STATES. By
CARMAN F. RANDOLPH. Boston: Little, Brown & Co.
1894.

The importance of this work can hardly be overrated. If there is one subject in the field of law, which is more misunderstood than another, it is the right of eminent domain.

On the one hand, the law-abiding citizen, who wishes to enjoy the fruits of his own labor, denounces it as an unwarrantable invasion of the right of the individual; on the other, the socialist, who prefers to board at some one else's expense, denounces it as ineffectual to compass his grand end, the confiscation of the property of the industrious for the benefit of the lazy. Yet, if it did not exist, there could be no progress; if it were not limited, there could be no stability, and, therefore, equally no progress.

But the tendency is to overlook the limitations, and lay too great stress upon the power. Mr. RANDOLPH, in his preface, states the cardinal principle, that: "Private property exists; if it is taken for public use, it must be paid for." But in his investigations he has, doubtless, found that courts do not always remember that fact, especially if they are interested in the stock of the corporations which exercise the power, or are the happy possessors of passes therefrom. And it is to be regretted that he has not more sharply criticised the shameful injustice that has been repeatedly imposed upon the owners of land, paid for by their own labor, for the benefit of speculators, who never did an honest day's work in their lives. This omission robs his work of much of the value that his thorough, painstaking investigation of the subject has otherwise earned for it.

As a statement of what has been decided on the subject, the book leaves nothing to be desired. From the historical outline of the doctrine down to the brief general conclusions at the end of some of the chapters, there is scarcely an important case omitted, or a judge-made principle of law disregarded. But he has not given enough space to the reconciliation of the conflicting decisions. True, the task would be Augean; but, however, imperfectly performed, it would have earned our lasting gratitude. A full, dispassionate review of the cases, which assert that a trolley road is no additional burden to the fee; that a corporation may poison the water of a running stream to the lasting injury of perhaps a hundred land-owners, without bearing an iota of the burden; that a man is presumed to anticipate the building of a cable road,

with the same amount of prescience as the psalmist, when he wrote: "Their line is gone out into all the earth;" and that a railroad may fill a man's house with the smoke of bituminous coal, with dust and cinders, and rock him to sleep with the gentle vibrations and dulcet notes of sixty-ton engines; would have gone far to create a healthier sentiment on the part of the rising generation, though the elder, like Ephraim, is so far joined to its idols, that it is better to let it alone—to save costs and vexation of spirit.

The work, however, is admirably planned and executed, and contains a very fair presentment of general principles, though defective in censure of the misapplication of these principles; and gives a clearer view of the law of eminent domain than any work hitherto published on that subject. Even, as it is, it will furnish an excellent instrument to open the eyes of a purblind court; and it cannot be too highly praised as a text-book for study.

One excellent feature, which might be adopted with advantage by other writers, is the appendix of recent cases, decided since the writing of the text, thus bringing the decisions down to the time of going to press. There is also an appendix of constitutional provisions, which, when compared with the decisions, serves to strongly emphasize the futility of human hopes and efforts.

R. D. S.

CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW. By JOHN WESTLAKE, Q. C., LL.D. Cambridge, England: University Press; New York: MacMillan & Co., Publishers. 1894. Price, \$2.60.

The author of this latest work upon the subject of international law is at present the Whewell Professor of International Law in the University of Cambridge. Although not intended primarily for use as a text-book in the class room, it is evidently the outcome of investigations engaged in for the purpose of teaching international law to students. It is not a book which could be of much use to a practitioner when called upon to deal with an actual case involving the subject

in question. It was obviously not written with that end in view. Its object is well stated by the author himself in the preface when he says that the book is not a detailed treatise on international law, but an attempt to stimulate and assist reflection on its principles. The author has disclosed the same purpose in the selection of his topics, which are rather subjects for abstract study of a general character than of direct practical application. Of the eleven chapters into which the work is divided one treats of international law in its relation to law in general; three chapters include brief biographies of seven of the more prominent among the early writers on this subject; still another discusses the elements of international law, which are traceable in the histories of Greece and Rome. One of the most valuable passages in the book occurs where the author points out the distinction between modern international law and the *jus gentium* of the Romans; and another where he explains that this science was prevented from reaching any great development at that time by the fact that such development requires the existence of a considerable number of States on an equal footing; whereas, at that period the Roman and Parthian empires divided the entire known world. Other chapters of the work, such as that upon the Empire of India, are of more interest to British readers than to our own students, as they contain nothing of general application. The chapter upon international rights of self-preservation, to which the reader naturally turns among the first, because of the prominence of that subject in recent diplomatic negotiations, is much too brief and discursive to give much satisfaction. To a lecturer upon international law in a college, or to a writer about to prepare a paper upon certain branches of the science, there is much in the present volume which would prove interesting and helpful. It can also be recommended to any one desirous of becoming a student of the subject from the historical standpoint, or to investigate a little more deeply than most writers go into the sources from which international law springs. Among other classes of readers the book is not likely to have a very wide circulation.

RUSSELL DUANE

A TREATISE UPON THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE. By PHILEMON BLISS, LL.D., Professor of Law in the Missouri State University, and late Judge of the Supreme Court of Missouri. Third Edition Revised and Annotated by E. F. JOHNSON, B.S., LL.M., Instructor of Law in the University of Michigan. St. Paul, Minn.: West Publishing Company. 1894.

The first edition of this work appeared in 1878, the second in 1887, and, as the learned editor says, the flattering reception given it by the Bench and Bar of the Code States, has called for a third edition in 1894.

As a working tool it, of course, appeals particularly to the practitioners of the Code States, now numbering twenty-six, but to those of the profession who desire to keep abreast with the progress of the law, to those who recognize that the law is a progressive science, it is entitled to careful study, even in States where special pleading and common law practice still hold their disciples in feudal tenure.

The author has perceived the distinction between the two classes of text books—digest and commentaries, and has the wisdom to elect for his subject the latter, and to discuss principles, although always with deference to judicial opinions. His book is not only a treatise but an apology, in the best etymological sense, on and of the system of Code Pleading. He indicates the reasons for its slow evolution, the want of harmony, the harsh discord due to the hostile conservatism of the Bench, and to the fact that it had to be worked out by legal minds inspired with a reverence for the old artificial forms of the common law which amounts to fetish worship. The learned author says on this point: "To this conservatism, as well as the disfavor or timidity with which the new system was received, we owe the fact that some of the rules peculiar to the common law, and opposed to the spirit of the new, are still cherished."

The point which a study of this book has forced upon the conviction of the reviewer, is that it exposes in terms the fallacious and shallow theory that it needs no acumen or learning.

to be a good pleader under the code practice, but that the ignorant and learned, the charlatan and the lawyer are on a footing. The author has expressed this thought, to which we wish to lend the weight of our conversion and conviction, with such felicity in his preface that we venture to quote from it again: "It is more necessary than before for the pleader to be a good and careful lawyer; also, that he should be able to write good English. His knowledge must be substantial and in studying his statement he studies his case. He must know what issuable facts will constitute a cause of action and must put there nothing else. One who becomes thoroughly familiar with the principles illustrated in this work cannot but become a good pleader—that is, if he understands his case."

We have addressed ourselves principally to the scientific import of the book for the consideration of the profession in "common law States" as a working tool in "Code States." The book is a good one.

The subject-matter is well marshalled, the broad underlying principles are sought for, explained, demonstrated. Sufficient authorities are cited. The writer evidences that his learning on the subject and science of pleading is broad and deep. The style is clear and forcible. Due attention has been paid to table of contents, table of cases and index, all of which are always of commanding importance. The make-up of the book is good; so also are its matter, method and manner, and we believe it must continue to command respect and attention.

E. P. ALLINSON.

HANDBOOK OF THE LAW OF CONTRACTS. By WM. L. CLARK, Jr. Hornbook Series. St. Paul, Minn.: West Publishing Co., pp. 923. Price, \$3.75.

This is one of the new series of attractive text-books issued by the West Publishing Co., under the name of the "Hornbook Series." The reason for the name of the series lies in the fact that the well established general propositions of law are printed at the head of each section in bold black-letter type. The present volume contains three hundred and

eighteen propositions of hornbook law printed in bold type. Following the introductory statement in each section is a full and adequate discussion of the law, printed in more modest type. The general propositions are stated with great conciseness and clearness. An illegal combination among dealers is thus admirably described: "A combination between dealers in a necessary commodity to control and enhance the price by preventing competition in the sale thereof, or by decreasing the production, or by withholding it from the market, or by other illegitimate means, is contrary to public policy."

Not only is the "hornbook" law well and clearly stated, but the literary style of the general discussion under each proposition is much above the average of the ordinary legal text-book. The author has well digested his material and in consequence is able to write with great freedom and grace. The book is an interesting one to read, which is more than can be said of most of the modern legal mosaics, which the practitioner is obliged to use in his daily work.

The author amply supports his propositions of law by appropriate citations. He states that 10,000 cases have been cited, and that every one of them has been personally examined, and cited because in point—"not because it has been cited by some other writer, or in some other case, or because it is found in the digests." This, of course, is the proper spirit in which to cite cases, and is worthy of all emulation. The book is well printed and well made, and is a worthy addition to the series of which it forms a part.

A. B. WENZEL.

A REVIEW IN LAW AND EQUITY FOR LAW STUDENTS. By GEORGE E. GARDNER, of the Massachusetts Bar. New York: Baker, Voorhis & Co. 1895. 299 pages.

This little book is primarily designed for students who are making their final preparations for admission to the Bar. It contains the time honored definitions which it is proper for every student to master, no difference how well he may be grounded in principles, and able to frame definitions for him-

self. The book also contains a concise statement of the leading principles in all departments of the law, and numbered classifications very helpful to the memory. The references are to the latest and best text-books. An appendix contains the rules regulating admission to the Bar in all the States and Territories.

A. B. WEINER.

COURTS AND THEIR JURISDICTION. By JOHN D. WORKS, formerly one of the Justices of the Supreme Court of California. Cincinnati: The Robert Clarke Company. 1894. 908 pages.

This work runs into many branches of the law, and is concerned largely with questions of jurisdiction. The titles of the chapters are: 1. Courts. 2. General Principles Affecting Jurisdiction. 3. Means of Acquiring Jurisdiction. 4. Venue. 5. Judges. 6. Common Law, Equity and Statutory Jurisdiction. The first five chapters contain a very complete and careful statement of the general principles of jurisdiction and a description of the organization of courts. In the last chapter which constitutes considerably over a third of the entire book, special subjects are considered, such as Probate, Garnishment, Crimes, Divorce, Sales of Real Estate, Injunctions, etc. These subjects are, of course, treated from their purely jurisdictional side, and while the author's discussion of each of them is necessarily general in character, much practical information is conveyed to the reader.

The chief defect of the work is the failure to give a separate discussion of the specific jurisdiction of the Federal Courts. There is no jurisdictional question which a lawyer has to consider so frequently as to the scope of the jurisdiction of the United States Courts. It may be to the advantage of a client to bring a suit in a Federal rather than a State Court, either to avoid local prejudice or to obtain the advantage of a ruling of the Federal Court contrary to that which prevails in a State Court. Innumerable questions involving rights to the enjoyment of property, immunities, commerce, "due process of law," are constantly arising, and in all such cases the first

question which confronts the practitioner is the question of the selection of his forum. In view of the importance of the subject, it is to be regretted that the author of this work did not include in it a separate, full and complete discussion of Federal jurisdiction. He has, of course, discussed many subjects relating to the Federal Courts, but only in an incidental and subordinate way.

Apart from the above criticism the author is entitled to all praise for the manner in which he has performed his work. His book is a model text-book, clear, logical, concise and accurate. It is admirably printed, and a credit to both author and publisher.

A. B. WEINER.

A PRACTICAL MANUAL OF MENTAL MEDICINE. By DR. E. RÉGIS, formerly Chief of Clinique of Mental Diseases, Faculty of Medicine, Paris. Formerly Assistant Physical of the Sainte-Anne Asylum. Physician of the Maison de Sante de Castel d'Andorte; Laureate of the Medico-Psychological Society and of the Faculty of Medicine of Paris. Professor of Mental Diseases, Faculty of Medicine, Bordeaux. With a Preface by M. BENJAMIN BALL, Clinical Professor of Mental Diseases, Faculty of Medicine, Paris. A work crowned by the Faculty of Medicine of Paris, Chateauvillard Prize, 1886. Second Edition. Thoroughly revised and largely re-written. Authorized translation by H. M. BANNISTER, A.M., M.D. With Introduction by the Author. Utica, N. Y.: Press of American Journal of Insanity. 1894.

This book is unique in that, so far as we know, it is the only book on the subject of insanity written by an alienist, translated by an alienist, printed and published at an insane asylum; the mechanical work being done entirely by the patients. We have read it through with much interest. Within the moderate compass of 660 pages it gives a complete, historical, pathological, clinical and practical view of the subject of insanity. The translation is an admirable one and the book is well calculated for the use of students. It is especially valua-

ble in its treatment of degeneracies of evolution, a subject which, so far as we know, is not found so well treated in any book in the English language. We cordially recommend it to the profession.

M. D. EWELL.

The Kent Law School, Chicago.
October 30, 1894.

COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY, being an Introduction to the Study of Contracts. By THEODORE W. DWIGHT, late Professor of Law at Columbia College, New York. Edited by EDWARD F. DWIGHT, of the New York Bar. Boston: Little, Brown & Co. 1894.

This work is confined in its scope to those topics included in the learned author's lectures at Columbia Law School immediately preceding the course on contracts. The first book deals with the law of personal rights and personal relations, and chapters are devoted to citizens, aliens, infancy, and finally to corporations. The important part of the second book treats of the method of acquiring ownership.

The book, while intended primarily for students, recommends itself not only to neophytes but to the young hierophants in the temple of justice, and may well be read by those who care to refresh their memory and understanding by reviewing the fundamental principles on which the law must ever rest. While neglecting none of the masters who have preceded him, nor forgetting the judicial declarations germane to his subjects, the work is not a mere digest nor a compilation of excerpts loosely thrown together as so many text-books are, which bear the impress of being written to order. The author has stamped his individuality on his work; his plan or scheme is well defined and sustained. The subject-matter is marshalled with intelligence and in natural sequence. The style is simple and terse but interesting and attractive.

The tables and index are full and complete, and both suggestive and responsive. It is sufficient to have named the publishers to give assurance of all the superior excellences of

the bookmakers' art, which always delight us in the productions of Little, Brown & Co. Even in these days of multitudinous productions this work may be said to shew cause.

E. P. ALLINSON.

CASES ON CRIMINAL LAW. By JOSEPH HENRY BEALE, Jr., Assistant Professor of Law in Harvard University. Harvard Law Review Publishing Association.

Professor BEALE, in his recent work upon selected cases from the Criminal Law, has placed before the profession a work which is entitled to the highest appreciation. In the arrangement of the cases, Professor BEALE has brought into accessible form, and disencumbered of text, what has been heretofore involved in text and note and almost concealed in the accretion of years of legal literature.

In the reported cases, the Bench, speaking, give the reason "for the faith." The cases present the Criminal Law in clear, concise and forcible terms, that are easily apprehensible.

The work evinces thoughtful care in the selection of the cases and an intelligent appreciation of the principles of the law concerned in the arrangement.

The range of the cases is from the early times of reported cases to the more recent English and American periods. The author, in presenting a principle of the Criminal Law, selects a case which elucidates it so clearly that the reason therefor stands forth as a model of perspicuity.

Professor BEALE, with great modesty, announces that the "collection of cases is chiefly intended for the use of classes in the schools." As a method of enabling the student to grasp the legal principle contained in the discussion of the case by the paths of thought, the syllabus has been dispensed with. An index, however, with the case in point, is attached to the work.

To the lawyer, the case involving the principle is readily ascertained, and to the student, the cases being grouped under the appropriate headings, the defined purpose of Professor BEALE is accomplished, the development of the mind by its

exercise and the acquirement of a legal principle through the continuity of thought. The system thus adopted has its decided advantages. The lawyer is quickly recompensed in finding his case, and the student receives the mental impulse in mastering the principle in the discussion.

The work of Professor BEALE is well worthy the lawyer's perusal, and to the seeker after legal principles, careful study.

JOHN A. SMITH.

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